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No. _____

In The

Supreme Court of the United States

NATHAN R., by and through his parents and next friends, RICHARD and NANCY R.,

Petitioners,

versus

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT NO. 200,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER PARENTS IN AN ACTION UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C. § 1400 *et seq.* ("IDEA"), ARE PREVAILING PARTIES WHEN THEIR CASE BECOMES MOOT DURING SCHOOL DISTRICT APPEALS AFTER PARENTS HAVE OBTAINED COMPLETE RELIEF – INCLUDING A RETURN TO SCHOOL AND COMPENSATORY SERVICES – THROUGH AN INTERIM ORDER ENFORCING STAY-PUT AND SUBSEQUENT SUCCESSFUL ADMINISTRATIVE ORDERS?

PARTIES

Petitioners:

NATHAN R., by and through his parents and next friends, RICHARD and NANCY R.

Respondents:

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT NO. 200

There are no parent companies or non-wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties ii

Table of Contents..... iii

Table of Authorities v

Opinions Below 1

Jurisdictional Statement..... 1

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations..... 2

Statement of the Case 2

Introduction..... 2

Facts..... 4

Reasons for Granting the Writ..... 9

I. The Petition Should Be Granted Because The Seventh Circuit Ruling Deprives An Entire Class Of Disabled Students Of Important Rights Which Congress Sought To Protect Under IDEA..... 9

II. The Petition Should Be Granted Because The Seventh Circuit Misreads IDEA And Deprives A Class Of Disabled Children Of Their Rights Under IDEA, In Conflict With District Courts In Other Circuits 14

A. The Seventh Circuit Decision Here Is Contrary To The Important Public Policy Consideration Pursuant To Which IDEA Was Enacted 14

TABLE OF CONTENTS – Continued

Page

B. The Seventh Circuit Opinion Here Is In Conflict With District Courts In Other Circuits... 17

III. The Petition Should Be Granted Because The Split In The Circuits Results In Arbitrary Diminished Rights For Disabled Children And Their Parents And Causes Inconsistent Application Of IDEA..... 19

A. In Contrast To The Seventh Circuit In *Nathan R.*, The Sixth Circuit Reinstates The Last Administrative Opinion On The Merits When The District Court Opinion Is Dismissed As Moot To Determine Prevailing Party Status..... 19

B. The Seventh Circuit's Blanket Denial Of Fees For Interim Relief Conflicts With Other Circuits, Which Have Granted Fees For Stay-Put Or Other Interim Relief When There Has Been A Determination On The Merits In The Interim Decision..... 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

U.S. Supreme Court

Hanrahan v. Hampton, 446 U.S. 754 (1980) (*per curiam*) 23, 24

School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1995) 9, 10, 15

U.S. Appellate Courts

Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) 24, 25

Board of Education of the Avon Lake City School District v. Patrick M., No. 98-3848 (6th Cir. 2000) (unpublished decision) (Appendix H) 20, 21

Haley v. Pataki, 106 F.3d 478 (2d Cir. 1997) 24

Nathan R. v. Board of Education of Oak Park & River Forest High School District #200, 199 F.3d 377 (7th Cir. 2000) 1, 18, 19, 21, 24, 26

St. Tammany Parish School Board v. State of Louisiana, 142 F.3d 778 (5th Cir. 1998) 25

U.S. District Courts

Bayonne Board of Education v. R.S., 954 F. Supp. 933 (D.N.J. 1997) 17

Jarczynski v. St. Mary's County Public Schools, 30 IDELR 38 (D. Md. 1999) 17

K.R. v. Board of Education of the Brentwood Union Free School District, 66 F. Supp. 2d 444 (E.D. N.Y. 1999) 24

TABLE OF AUTHORITIES – Continued

Page

Smith v. Roher, 954 F. Supp. 359 (D.D.C. 1997)..... 17

Stuart v. Nappi, 610 F. Supp. 90 (D. Ct. 1985)..... 18

FEDERAL STATUTES

20 U.S.C. § 1400 *et seq.* 1, 2

20 U.S.C. § 1400(c)(2)(B) (1997)..... 10

20 U.S.C. § 1400(c)(2)(C) (1997) 10

20 U.S.C. § 1400(d) (1997) 10

20 U.S.C. § 1412(a)(1)(A) (1997) 3, 6

20 U.S.C. § 1415(e)(3)(A).....4, 9

20 U.S.C. § 1415(e)(4)(B) 2, 9, 15

20 U.S.C. § 1415(i)(3)(B) (1997)..... 2

20 U.S.C. § 1415(j) (1997) 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 1

42 U.S.C. § 1988(b) 23, 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners Nathan R., Richard R., and Nancy R., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is dated January 20, 2000 and reported at 199 F.3d 377 (7th Cir. 2000) (App. A). The District Court opinions from the Northern District of Illinois are minute orders dated August 12, 1997 (App. B, p. 13a) and July 9, 1997 (App. C, p. 14a). Judgment on the July 9 Order was also entered July 9, 1997 (App. D, p. 15a). The unpublished administrative decisions are dated June 26, 1996 (Level II, App. E, p. 16a), January 15, 1996 (Level I, App. F, p. 32a), and October 30, 1995 (Stay-Put, App. G, p. 61a).

JURISDICTIONAL STATEMENT

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming in part, vacating and remanding in part, was entered on January 10, 2000. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 arising under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioners were granted until June 8, 2000 to file their Petition for Certiorari (Application No.

99 A 775). This Petition for Certiorari is timely filed on June 8, 2000.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

(See Appendix I, p. 82a)

STATEMENT OF THE CASE

INTRODUCTION

This is a dispute regarding prevailing party status under the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 *et seq.*) ("IDEA").[1] The fundamental

[1] This case was initially brought in 1995. In 1997, Congress reauthorized and amended the IDEA. These amendments reorganized the Statute. Prior to 1997, IDEA's attorney fees provision was found at 20 U.S.C. § 1415(e)(4)(B), which states in relevant part:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party

The attorney fee provision is now found at 20 U.S.C. § 1415(i)(3)(B) (1997), which similarly states in relevant part:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the

question is whether parents who obtain all the relief they have requested through administrative orders and an order of stay-put retain their prevailing party status when the case becomes moot during school district appeals. Petitioners here are parents seeking prevailing party status after they were successful in having their behaviorally disordered son returned to school (after a 27 day illegal exclusion) pursuant to IDEA's stay-put provision, won relief including compensatory services at two administrative hearings and kept their son in school until the matter became moot. The Seventh Circuit Court of Appeals vacated the District Court's opinion on the merits (which reversed the administrative opinions favoring parents) as moot because Nathan R. had graduated while the appeal was pending.[2] Nevertheless, the Seventh Circuit denied attorney's fees and costs to parents, finding they were not prevailing parties because they obtained only interim relief. Parents, Petitioners here, seek a Writ of Certiorari to review that decision.

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parents of a child with a disability who is the prevailing party.

Thus there were no relevant changes to IDEA on this point. Consistent with the decisions below, cites to IDEA herein will be to the pre-1997 Act unless otherwise indicated.

[2] Parents argued on appeal that the matter was moot by the time the District Court ruled because, pursuant to the Reauthorized IDEA, effective June 4, 1997, the law was clear that Nathan R. could not then be expelled with a cessation of services. 20 U.S.C. § 1412(a)(1)(A) (1997). But the Seventh Circuit declined to rule on this point, finding that the matter was moot on appeal in any event, as Nathan R. had by then graduated (App. A, p. 8a). The District Court's opinion on the merits was therefore dismissed as moot (*Id.* at 9a).

FACTS

Nathan R. was a student identified as eligible for services under IDEA, with a primary disability of Behavior/Emotional Disorder. The present matter arises out of the public School District's attempt to expel Nathan, terminating all educational services to him. Parents subsequently (on September 26, 1995) requested administrative due process under IDEA. Parents challenged the termination of all educational services to Nathan, but not the expulsion *per se* (App. E, p. 30a). Parents specifically sought in their due process request that Nathan's placement be stayed pursuant to IDEA, 20 U.S.C. § 1415(e)(3)(A), pending resolution of the issues raised.[3]

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[3] IDEA's stay-put provision at the time this action arose stated [20 U.S.C. § 1415(e)(3)(A)] in relevant part:

> Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The stay-put provision in the revised Act similarly states in relevant part [20 U.S.C. § 1415(j) (1997)]:

> Maintenance of current educational placement Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial

The School District refused to stay Nathan's placement, arbitrarily and without notice extended his suspension and then expelled him, terminating all regular and special education services. Parents filed a motion for emergency order of stay-put placement, which the School District contested. On October 30, 1995, the Level I administrative hearing officer ordered the School District to return Nathan to school during the pendency of these proceedings (App. G, p. 67a). He was thereupon returned to his prior placement where he continued to receive special education and related services.

The Level I hearing officer ultimately found that the school district was obligated to provide special education services to Nathan during the term of his expulsion, sufficient to provide him with a free appropriate public education (App. F, p. 51a). Both parties appealed in part. On June 26, 1996, the Level II administrative hearing officer similarly found that the school district was obligated to provide special education and related services to Nathan during the term of his expulsion (App. E, p. 25a). The Level II hearing officer further ordered compensatory services to Nathan to compensate him for educational services denied to him from the time he was removed from school until he was returned pursuant to the Level I emergency order (App. E, p. 30a).

The School District filed an appeal of the Level II administrative decision in federal District Court on July 25, 1996. Parents filed a counter-claim seeking attorney's

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admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

fees and costs as prevailing parties in the three administrative proceedings. The School District complied with all the administrative orders won by the parents, including for compensatory services. In September 1996, the School District filed a motion for summary judgment. Parents filed a response and cross-motion on the attorney fee issue. By this time the School District had provided all the special education, related services and compensatory education parents obtained through the administrative orders.

On June 4, 1997, IDEA was reauthorized and amended to clarify that educational services to eligible students could not be terminated, even if those students are expelled for behavior unrelated to their disabilities. 20 U.S.C. § 1412(a)(1)(A) (1997). This amendment took effect immediately. Therefore, as of June 4, 1997, the School District clearly could not (and did not) terminate educational services to Nathan R.

On July 9, 1997, as Nathan was about to enter his senior year of high school *on target* for graduation because of the relief won against the School District, the District Court issued a one paragraph minute order granting the School District's motion for summary judgment, thus overturning the two Level I Decisions and the Level II Review Decision in favor of parents (App. C, p. 14a). This order was entered after parents had actually received all the relief they sought, after the law had been clarified to support parents' position and when the case was already moot. Parents filed a Rule 59 and 60 motion arguing that the case was moot because Nathan R. had already been provided all the special education, related services and compensatory services pursuant to the

administrative orders and because there was no possibility of the action recurring as a result of the reauthorized IDEA. Parents also sought attorney's fees and costs as the prevailing party. The District Court denied the motion in a one paragraph minute order claiming that parents had not received the relief they sought through a "judgment or settlement" (App. B, p. 13a). Parents argued that they had, in fact, received the relief through Hearing and Appeal orders and had further obtained full compliance with those Orders from the School District. Parents appealed to the Seventh Circuit, arguing that the School District's claim was moot by the time the District Court entered judgment and that parents were prevailing parties because they received complete relief through the orders of the Hearing Officers which were implemented continuously until the matter became moot and which provided substantive relief on the merits.

The Seventh Circuit refused to address Parents' argument that the issues were moot *before* the District Court ruled and, instead stated:

> *We do not reach this question because, even if the case was not moot when the district court issued its opinion, the action is now moot due to Nathan's graduation from high school.*

(App. A, p. 8a).

The Seventh Circuit relied on the same argument that parents had advanced in the District Court:

> *no action this court might take would affect his or the school's rights; judgment for the parties would have afforded them no relief whatsoever and thus the*

> *action was moot; courts may only adjudicate actual, ongoing controversies.*

(*Id.*).

The Seventh Circuit then vacated the District Court's judgment and remanded for the District Court to dismiss (App. A, p. 9a). The final judgment on the merits, then, is the Level II administrative decision in favor of Parents (App. E, p. 16a).

The Seventh Circuit next addressed Parents' claim for attorney's fees and costs. In their Rule 59 and 60 motions, Parents argued that they had prevailed and obtained all the relief they sought not only through the pre-Hearing order on stay-put but also through the Level I and Level II Hearing and Appeal Decisions, all of which were decisions on the merits.

The Seventh Circuit, however, concluded that Parents' successful wins *at all administrative* levels, which were enforced in 1995-96, were merely a *"defacto win"* and did not rise to the level of an enforceable judgment, consent decree or settlement that materially alters the relationship between the parties, that the three years of complete relief they won was only "interim" and did not entitle parents to attorney's fees and costs (App. A, p. 11a). The Seventh Circuit then held "explicitly that invocation of the stay-put provision of the IDEA does not entitle the party to attorney's fees" (App. A, p. 12a).

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT RULING DEPRIVES AN ENTIRE CLASS OF DISABLED STUDENTS OF IMPORTANT RIGHTS WHICH CONGRESS SOUGHT TO PROTECT UNDER IDEA.

Little is more important to education than a student's high school career. Likewise, nothing is more certain than this Court's recognition that the IDEA administrative and Court proceedings are ponderous and lengthy. *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1995).

Because of the important rights protected by IDEA, Congress included a fee shifting section for prevailing parents in the Act. Specifically, IDEA provides, at 20 U.S.C. § 1415(e)(4)(B):

> *In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney fees as part of the costs to the parents or guardian of a child with a disability who is the prevailing party.*

One of the subsections of 20 U.S.C. § 1415(e) is the very provision on which Appellants here prevailed. Specifically, 20 U.S.C. § 1415(e)(3)(A), the "stay-put" provision, provides:

> *During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child . . . until all such proceedings have been completed.*

There is no exception in IDEA for attorney fees incurred in pursuing "stay-put" placements. To the contrary, the stay-put provision provides important relief Congress sought to promote in IDEA. Congress specifically found, in passing the Education for All Handicapped Children Act of 1975 (now IDEA) that over 1,000,000 children with disabilities were being excluded entirely from the public school system. 20 U.S.C. § 1400(c)(2)(C) (1997). Congress also found that fully half of the children with disabilities in this country did not receive appropriate educations. 20 U.S.C. § 1400(c)(2)(B) (1997). In response to its alarming findings, Congress enacted EHA (now IDEA), the purpose of which is:

> *to assure that all handicapped children have available to them . . . a free appropriate public education which emphasized special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected.* 20 U.S.C. § 1400(d) (1997).

As this Court has found, "[a]pparently recognizing that . . . in any disputes [with parents] the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of the substantive issues." *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1995).

The stay-put provision is one of those important procedural safeguards. It precludes school districts from unilaterally removing children from their special education placements.

Nathan's case arose in 1995, his second year of high school. The Seventh Circuit ruled in the year 2000, five years later, and nearly two years after he graduated. Given the lengthy nature of IDEA administrative procedures, disabled high school students who choose to exercise their rights under IDEA will often have graduated long before the litigation is concluded. When a dispute involves the important issue of whether or not a child may be removed from his public school placement, or indeed any other issue related only to placement or evaluation and not seeking reimbursement, the case is likely to be moot before a final order on the merits is entered. Pursuant to the Seventh Circuit opinion in this case, those children whose cases become moot before final decision cannot be prevailing parties entitled to reimbursement of attorney's fees and costs. Thus, parents and children who obtain all the relief they seek through such "interim" relief can now be dragged through appeals by recalcitrant school districts until the students graduate or age out of special education or the case otherwise becomes moot. This way, the school district avoids responsibility for attorney's fees and costs for pending litigation. More significantly, the district deters other parents from enforcing their children's rights by making enforcement too costly. Many tenth, eleventh and twelfth grade students would have no meaningful procedural rights because their cases would become moot before final resolution, while the school districts jam the courts with appeals designed to avoid payment of prevailing parents' attorney's fees and to deter enforcement of rights.

Disabled children in elementary grades would have heightened IDEA rights (over high school students), because their school careers would presumably outlast the administrative/court proceedings.

The *Nathan R.* decision thus has a chilling and punitive effect on parents. Instead of being reimbursed for enforcing the "stay-put" provision of IDEA and obtaining a prompt administrative remedy for their disabled child, they are punished by losing their right to attorney's fees and costs, even when, as in Nathan's case, they go on to prevail on the merits in the final administrative decisions, are awarded and receive compensatory education services thereby and obtain enforcement of those orders continuously, every step of the way.

Parents of disabled children should not have to forego one of their IDEA rights, the right to attorney's fees and costs, merely because they are simply seeking to continue educational benefits to their child. In Nathan's case, the School District blatantly terminated all educational services and removed him from school for 27 days *after* the due process hearing request was filed. Every administrative Hearing Officer found the School District's actions to violate IDEA. Parents acted quickly and successfully in obtaining an emergency order of stay-put over the school district's objections, reversing the district's actions. Parents then locked in their win with successful Level I and Level II Hearing Decisions, including compensatory services for the 27 days out of school. The School District complied with those orders. Parents did not win merely through invoking the status quo, rather, they won by enforcing their rights over school district objections every step of the way.

Obtaining stay-put over a school district's objection is beyond the capability of most lay-parents. They need the services of an attorney. However, in the Seventh Circuit, only the wealthiest parents will be able to access the protections of stay-put, for they must be prepared to sacrifice their rights to attorney's fees and costs available under IDEA if they exercise their stay-put rights and the matter becomes moot before final resolution.

Nathan's parents succeeded in obtaining a pre-hearing stay-put order returning him to school. The Level I Decision on the merits agreed that the district owed continuing appropriate educational services to Nathan and that the school district had violated IDEA's stay-put provision. Parents then successfully withstood the School District's challenges at Level II, and until the issue of continued services became moot. Parents should not forfeit their right to attorney's fees and costs for five years of litigation, most of which consisted of the School District's appeals. The School District's appeals continued even after it had provided Nathan all the relief sought and therefore could obtain no relief from any order of the District Court.

Courts should encourage parents to use the procedural remedies Congress provided in IDEA and deter school districts from violating those procedures. To punish parents by carving out an exception to the attorney fees provision of IDEA not intended or specified by Congress denies parents the very rights IDEA bestows on all disabled children. Those rights should not just be accessible to elementary students, whose school careers will hopefully outlast the school district's financially exhausting legal maneuvering.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT MISREADS IDEA AND DEPRIVES A CLASS OF DISABLED CHILDREN OF THEIR RIGHTS UNDER IDEA, IN CONFLICT WITH DISTRICT COURTS IN OTHER CIRCUITS.

A. The Seventh Circuit Decision Here Is Contrary To The Important Public Policy Considerations Pursuant To Which IDEA Was Enacted.

IDEA lists the following relevant and specific due process rights for disabled children:

1. *To a due process hearing and state level review (in states that have a two-tier system).*
2. *To "stay-put" or maintenance of the child's current placement.*
3. *To attorney's fees and costs for any action brought under this Section.*

See 20 U.S.C. § 1415.

These are distinct enforceable rights. The "stay-put" provision (20 U.S.C. § 1415(e)(3)) should operate as an automatic injunction preventing school districts from taking arbitrary action to exclude students or to change the child's placement while a dispute is resolved through due process hearing procedures. This avoids unnecessary disruption of a child's education. In Nathan's case, however, the School District unilaterally refused to follow the automatic injunction. Instead, the District had suspended Nathan 10 days. Parents filed for a hearing. Nathan was scheduled to return to school at the end of the suspension, as he had not yet been expelled. But without notice

to parents, the School District continued Nathan's suspension and then expelled him while parents' due process hearing request was pending. Parents had to enforce the stay-put procedure, over the School District's objection, through litigation to the Level I Hearing Officer. Only upon order of the Hearing Officer did the School District permit Nathan to go back to school.

This Court has held that at least one purpose of the stay-put provision, was to prevent school officials from removing a child from school pending completion of the review proceedings. *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1995). The Court recognized Congress' concern for the widespread practice of warehousing or excluding disabled students (*Id.*). This Court emphasized that "§ 1415(e)(3) is located in a section detailing procedural safeguards which are largely for the benefit of the parents and the child" (*Id.*).

Contained within the procedural section of IDEA, and in close proximity to the stay-put provision, is parents' right to attorney's fees and costs:

> *In any action or proceeding brought under this subsection, the Court, in its discretion, may award reasonable attorneys' fees as part of the costs to parents or guardian of a child or youth with a disability who is a prevailing party.*

20 U.S.C. § 1415(e)(4)(B).

Congress, then, intended parents of disabled children to be awarded attorney's fees and costs for hearings, administrative review, judicial proceedings and "stay-

put" proceedings, all of which are separate rights listed in this section of the Act.

In 1997, Congress did carve out exceptions to the attorney fee provisions. Those exceptions included specification that parents could not be awarded attorney's fees for IEP meetings unless the meetings are convened as a result of an administrative or judicial action, or for mediation.[4] Congress could have, but did not, carve out an exception for enforcing and defending parents' rights to stay-put under § 1415. Without Congressional authority, the Seventh Circuit has carved out its own exception:

> *Indeed, we have also stated explicitly that invocation of the stay-put provision of the IDEA does not entitle the party to attorney's fees.*

(App. A, pp. 11a-12a).

As demonstrated in Nathan's case, the Seventh Circuit precludes attorney fees even when parents have to enforce the stay-put provision through litigation over the school district's objections. This holding gives school districts incentive to violate stay-put unless or until they are ordered to do otherwise. This is contrary to Congress' intent and to the important public policy of continuing a child's education without unwarranted interruption.

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[4] These Amendments are not relevant to the issue here: whether parents are prevailing parties.

B. The Seventh Circuit Opinion Here Is In Conflict With District Courts In Other Circuits.

The Seventh Circuit's holding here is also contrary to the application of IDEA in District Courts of other Circuits. For example, the U.S. District Court for the District of Columbia recently found that when Plaintiffs obtained "stay-put" placement which ordered the school district to return students to their stayed placements, and to continue to fund those placements over school district objections, Plaintiffs were prevailing parties entitled to attorney fees, despite the fact that the matter was ultimately dismissed as moot. *Smith v. Roher*, 954 F. Supp. 359, 362 (D.D.C. 1997). The court there found that, "[a]lthough judgment was not entered on the merits, the plaintiff [school district] was denied the relief sought and the defendants [parents] successfully preserved the administrative hearing officer's decision below" (*Id*). Similarly, the School District in *Nathan R.* was denied the relief it sought, and parents have preserved the relief obtained pursuant to the hearing officers' orders.[5]

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[5] See also *Bayonne Board of Education v. R.S.*, 954 F. Supp. 933 (D.N.J. 1997). There, the District disputed its obligation to fund a private program as the "stayed" placement. The administrative hearing officer ordered the placement stayed, the District appealed on that issue (the remaining matters remained pending). *Id.* at 937. Parents, meanwhile, sought attorney fees for having successfully obtained the stay-put placement. *Id.* at 943. The court found that Parents were the prevailing party, having obtained the requested relief (stay-put), and were entitled to fees for the stay-put action (*Id.* at 943-44).

Similarly, in *Jarczynski v. St. Mary's County Public Schools*, 30 IDELR 38 (D. Md. 1999), parents were awarded attorney fees for

Parents in *Nathan R.* should similarly have been found prevailing parties.

Similarly, in *Stuart v. Nappi*, 610 F. Supp. 90 (D. Ct. 1985), plaintiff was the prevailing party awarded attorney's fees where she obtained a preliminary injunction preventing her removal from school upon expulsion, and that injunction was continued until the matter was ultimately dismissed as moot upon plaintiff's graduation. In the Second Circuit, then, parents of disabled children can enjoy all their rights guaranteed under § 1415 of IDEA. In the Seventh Circuit, parents who choose to assert their § 1415 stay-put rights must waive their § 1415 rights to attorney's fees and costs if their case becomes moot before final resolution, even when, as Nathan did, they prevail in all the subsequent administrative Hearings and receive all the relief ordered against the School District.[6]

Such an effect creates a class system among disabled children which depends on their circuit of residence and effectively prevents a large number of disabled students

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enforcement of IDEA's stay-put provision, even when an administrative law judge had thereafter concluded that the school district's IEP was appropriate. The district court reasoned that the stay-put decision was at issue here and, in any event parents could still appeal the law judge's order.

[6] Of course, all disabled students' cases will eventually become moot unless they are seeking money damages, as they all graduate or lose IDEA eligibility at age 21. Thus under the Seventh Circuit's standard, a school district need only drag a case through court until the child ages out or graduates to avoid attorney's fees and costs and to deter other parents from enforcing their rights under IDEA.

from enjoying the umbrella of protection envisioned by Congress when it enacted IDEA.

In Nathan R.'s case, parents successfully enforced stay-put after the School District continued Nathan's suspension past the legal limits, without the required notice, expelled him while the Hearing was pending, and further insisted, without the benefit of a multidisciplinary conference ("MDC") required by IDEA, that Nathan be stripped of his IDEA eligibility and services and that his program be changed to some part-time regular education computer program or that he show up at the public library for some unspecified tutoring (See: App. E, p. 27a).

Parents here are prevailing parties under IDEA. The Seventh Circuit erred in modifying IDEA in such a fashion. If this Court declines review, parents who cannot afford attorneys will be unable to enforce stay-put rights under IDEA.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE SPLIT IN THE CIRCUITS RESULTS IN ARBITRARY DIMINISHED RIGHTS FOR DISABLED CHILDREN AND THEIR PARENTS AND CAUSES INCONSISTENT APPLICATION OF IDEA.

A. In Contrast To The Seventh Circuit In *Nathan R.*, The Sixth Circuit Reinstates The Last Administrative Opinion On The Merits When The District Court Opinion Is Dismissed As Moot To Determine Prevailing Party Status.

In the Sixth Circuit, a school district continued five years of exhausting litigation, even after the case was

moot because parents had already obtained all the relief they sought. *Board of Education of the Avon Lake City School District v. Patrick M.*, No. 98-3848 (6th Cir. May 24, 2000) (unpublished opinion) (App. H, p. 69a). In that case the parents sought reimbursement of a unilateral private residential placement. The school district won at the administrative hearing. Parents appealed and the State Level Review Officer reversed in favor of parents. In March 1997, Avon Lake appealed to the District Court. Patrick M. filed a counter-claim for attorney's fees and costs and § 1983 and § 504 claims. In October 1997, pursuant to settlement agreement with the residential school, Avon Lake paid the bill for the residential school. In that settlement agreement the parties released any claims they may have for payment or reimbursement from parents. Patrick M. thereupon moved for attorney's fees and costs, arguing that parents had prevailed. The school district argued that the District Court must still conduct a *de novo* review and rule on the merits, notwithstanding parents' insistence that the case was over. The District Court granted summary judgment in favor of Avon Lake City Schools. Parents appealed to the Sixth Circuit. The Sixth Circuit found the case moot when parents received all the relief they sought in bringing the hearing, namely, the payment of the unilateral placement by Avon Lake City School District. In remanding the case to the District Court for dismissal of the District Court opinion entered after the case was already moot, the Sixth Circuit said:

> *The district court's judgment in favor of the School District is without effect.*
>
> *Thus, the final decision in this case is the S[tate] L[evel] R[eview] O[fficer]'s decision in favor or [sic]*

> *Parents . . . Parents are therefore the prevailing party . . .*

(App. H, p. 81a (unpublished opinion)).

Likewise, in *Nathan R.*, the Seventh Circuit, upon vacating the District Court's minute orders, should have ruled that the minute orders were without effect, and found that the final decision in the case is the Level II Decision, which, like the SLRO's decision in *Avon Lake* had already been implemented when the District Court ruled in July 1997.[7] In *Avon Lake*, parents were not a party to any settlement agreement but benefited from interim relief in the form of Avon Lake's payment of the bill, as ordered by the SLRO. Similarly, Nathan R. benefited from "interim" relief in the form of his three Hearing Orders and the clarification of IDEA.[8]

The Seventh Circuit correctly vacated the District Court decision because the case was moot. However, it erred by failing to recognize that with the District Court minute orders vacated, the Level II Administrative Appeal Decision in favor of Nathan R. was the final and binding decision and order in the case, a decision and order adverse to the School District and which had

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[7] The Sixth Circuit had no trouble examining the record to determine when the case actually became moot – when Avon Lake paid the bill for the private school – while the Seventh Circuit evaded the issue.

[8] The Seventh Circuit miscasts a victory which extended throughout the remaining years of Nathan's school career as "interim" relief. The parents won at every stage of the proceedings, until Nathan had received all the relief ordered against the School District, including compensatory services, and the matter became moot.

already been implemented before the District Court ruled in July 1997. The Seventh Circuit erred when it closed its eyes to the standing of the Level II Order in Parents' favor and completely discounted the decisions on the merits, finding instead:

> *We may consider only their [Parents'] claim for attorneys' fees stemming from the imposition of the stay-put placement because any other decision would go to the merits of the action which are now moot.*

(App. A, p. 10a).

B. The Seventh Circuit's Blanket Denial Of Fees For Interim Relief Conflicts With Other Circuits, Which Have Granted Fees For Stay-Put Or Other Interim Relief When There Has Been A Determination On The Merits In The Interim Decision.

In the present case, Nathan R. received both interim stay-put relief and two favorable administrative orders on the merits. Even the order of stay-put made findings on the merits. Specifically, the Level I Hearing Officer's stay-put order found that a policy of the Department of Education required a school district to continue educational services to students with disabilities who are expelled from school for misconduct not related to their disabilities (App. G, pp. 66a-67a). The stay-put order held that this policy was binding on the school district here (*Id.*). The stay-put order therefore held that the school district violated the policy of the United States Department of Education (App. G, p. 65a). These same rulings were incorporated into the Level I Hearing Officer's order on the merits (App. F, pp. 49a-51a).

Despite these findings on the merits of parents' claims, the Seventh Circuit characterized the relief received as "interim relief", holding without further inquiry "that the receipt of interim relief does not qualify a party for attorneys' fees" (App. A, p. 11a). Further, the Seventh Circuit specifically found "invocation of the stay-put provision of the IDEA does not entitle the party to attorney's fees" (App. A, p. 12a).

Even if Nathan's relief is correctly characterized as only interim relief, the Seventh Circuit is in conflict with other Circuits in its blanket denial of fees for interim relief. Courts in other Circuits have refused to issue such a blanket denial of fees for stay-put or other interim relief. Instead, these Circuits look to see whether the interim relief was based upon a review of the merits rather than upon a balancing of the equities. These Circuits base their rulings upon an analysis of this Court's holding in *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (*per curiam*). The Court in *Hanrahan*, interpreting the fee shifting statute in 42 U.S.C. § 1988(b), along with its legislative history, reversed a Seventh Circuit opinion awarding attorney fees to parties who obtained on appeal reversal of a directed verdict against them and some additional discovery (*Id.* at 756). This Court found that respondents in *Hanrahan* had not prevailed on the merits of their claims. In fact, the Seventh Circuit had specifically not ruled on the underlying merits. Instead, the parties were simply entitled to some additional discovery and a trial on their claims. They might or might not be successful at that trial (*Id.* at 758-59). But the Court specifically noted that Congress did intend to permit an interim award of

fees when a party has prevailed on the merits of at least some of his claims (*Id.* at 757-58).

Thus, the Second Circuit found prevailing party status and affirmed an award of attorney's fees under 42 U.S.C. § 1988(b) when a preliminary injunction was granted, defendant complied with the injunction and the matter was dismissed as moot prior to decision on the merits. *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997). The Second Circuit refused to "automatically require denial of attorney's fees when a party receives a stay or preliminary injunction but never obtains final judgment" (*Id.* at 483). Instead, the Second Circuit held that if a claim is mooted, "attorney's fees are proper if the court's action in granting the preliminary injunction is governed by its assessment of the merits" (*Id.*). Upon examining "the decisional circumstances and reasoning underlying the grant of preliminary relief", the Second Circuit in *Haley* found that fees were proper, as the district court had based the preliminary injunction on the merits of plaintiffs' claim (*Id.*).

This test has been applied to IDEA actions where, as in *Nathan R.*, parents had to enforce IDEA's stay-put provision through litigation, rather than just invoke the *status quo*. *K.R. v. Board of Education of the Brentwood Union Free School District*, 66 F. Supp. 2d 444, 450-51 (E.D. N.Y. 1999).

The First Circuit similarly looks to whether preliminary relief was awarded based on a review of the merits in deciding whether fees are appropriate for interim relief. *Basic Human Needs v. King*, 691 F.2d 597, 601-02 (1st Cir., 1982). Contrary to the Seventh Circuit, the First

Circuit specifically refused to find that preliminary relief never warrants the award of fees (*Id.*). The First Circuit found plaintiffs to be prevailing parties entitled to fees when they obtained an injunction pending appeal which ordered the state defendants to resume payments to certain welfare recipients in the absence of an approved state budget. Although the governor and state legislature thereafter approved a full budget that mooted plaintiffs' suit before the injunction took effect (*Id.* at 599), the court in *Basic Human Needs* found that fees were warranted because plaintiffs established their legal entitlement when the court entered its preliminary injunction upon review of the merits (*Id.* at 601). In contrast to plaintiffs in *Basic Human Needs*, Nathan R. and his parents not only established their legal entitlement in both the stay-put and administrative decisions on the merits, but they also *received* all the relief requested. Yet, under the Seventh Circuit's rule, Nathan R. was denied his attorney fees and costs.[9]

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[9] See also: *St. Tammany Parish School Board v. State of Louisiana*, 142 F.3d 778 (5th Cir. 1998). Here, at the District Court level parents successfully sought to have a unilateral private residential placement declared the child's "stay-put" during the pendency of the proceedings after a state administrative appeal panel found that the private placement was the appropriate placement. The educational agencies appealed the stay-put order to the Fifth Circuit. The Fifth Circuit affirmed in favor of parents and remanded to the District Court for proceedings on the merits. Once parents prevailed on the "stay-put" issue, which was the same as the ultimate relief they sought in the case, the parties entered into settlement negotiations and the case, in fact, settled, including payment of the attorneys' fees and costs. In the *St. Tammany* case, parents lost the first Hearing, won at the administrative appeal level, and then won the

Nathan R. and his parents had to do more than invoke IDEA's *status quo* provision to obtain relief here. They had to litigate to enforce stay-put over the school district's objections, to get Nathan back to school. The Hearing Officer examined the merits in issuing the stay-put order, as well as in issuing her order on the merits. Parents received all the relief they requested as a result. The Seventh Circuit should not have simply refused to award fees and costs for interim relief without further inquiry as to the basis for that relief.

CONCLUSION

This case presents a question of exceptional importance: whether parents and children in IDEA actions lose their eligibility for attorney fees when their case becomes moot, even after they have received complete relief. If the Seventh Circuit opinion here is allowed to stand, parents who cannot afford to pay an attorney will be foreclosed from enforcing their stay-put rights when a school district unilaterally removes a special education child from school. Indeed, parents of high school students who cannot afford to pay an attorney will be foreclosed from

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interim stay-put order. The interim stay-put order secured parents the relief they sought and, because of the availability of fees for parents, encouraged settlement. Defendants agreed to pay attorney's fees and costs. Pursuant to the Seventh Circuit opinion in *Nathan R.*, however, Plaintiffs would simply not have been entitled to attorney fees for their clients in securing and defending their "interim relief".

enforcing any IDEA rights that might become moot during the course of lengthy litigation. By granting parents' and Nathan's petition for certiorari here, this Court can preserve IDEA's protections for all eligible students, and deter school districts' violations of IDEA. This is in accord with the policy behind IDEA – to ensure a free appropriate public education to all eligible students.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 97-3341

Board of Education of Oak Park
& RIVER FOREST HIGH SCHOOL DISTRICT 200,

Plaintiff-Appellee,

v.

NATHAN R., by and through his Parents and
Next Friends, RICHARD AND NANCY R.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 4581 – Elaine E. Bucklo, Judge.

Argued November 12, 1999 – Decided January 10, 2000

Before FLAUM, RIPPLE and ROVNER, Circuit Judges.

RIPPLE, Circuit Judge. Oak Park & River Forest High School District ("the School") expelled Nathan R. ("Nathan"), a student receiving special education services on account of a behavioral disorder, for possession of marijuana on school grounds. Nathan and his parents, Richard and Nancy R. (collectively referred to as "Parents"), appealed to a Level I administrative hearing officer who held that Nathan's misconduct was unrelated to his disability but that the School nevertheless needed to provide him with special education services during his

expulsion.[1] The Level II administrative hearing officer affirmed. The School appealed to the district court; it contended that it was not obligated to provide Nathan with special education services during his expulsion. The court determined that *Doe v. Board of Education of Oak Park*, 115 F.3d 1273 (7th Cir.), *cert. denied*, 522 U.S. 998 (1997), established that the School did not need to provide the services. The Parents cross-claimed for attorneys' fees, under 20 U.S.C. § 1415(e)(4)(B) of the Individuals with Disabilities Education Act ("IDEA"), claiming that their invocation of "stay-put placement" – which allowed Nathan to stay in school until the final disposition of the matter – entitled them to such an award. The district court denied the Parents relief, holding that they were not prevailing parties.

We now hold that the issue of whether the School was obliged to provide special education services to Nathan during his expulsion is moot because he has graduated from high school. However, we conclude that we do have jurisdiction over the question of whether the Parents are entitled to attorneys' fees for the invocation of stay-put placement. On this question, we hold that the Parents are not prevailing parties and are not entitled to attorneys' fees.

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[1] The Individuals with Disabilities Education Act authorizes an appeal from the decision of a school board to a Level I administrative hearing officer. *See* 20 U.S.C. § 1415(b)(2). Thereafter, the decision of the Level I hearing officer may be appealed to a Level II administrative hearing officer. *See* 20 U.S.C. § 1415(c). That decision may then be appealed to a United States District Court for judicial review. *See* 20 U.S.C. § 1415(e)(2).

I

BACKGROUND

A. Nathan's Expulsion

On September 13, 1995, school security found marijuana in Nathan's possession and the School suspended him. Six days later the School held an expulsion hearing at which Nathan admitted the drugs were his. It also held a meeting at which it determined that Nathan's misconduct was unrelated to his disability.[2] On September 26, the Parents filed a due process request as allowed by the IDEA.[3] They contended that the School had failed to recognize the relationship between Nathan's disability and his drug possession and requested that Nathan's placement in school, with his special education services,

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[2] Nathan's disability is a behavioral/emotional disorder that includes immaturity, impulsiveness, anger, depression, and poor self-esteem. His Individual Education Plan ("IEP") also states that "Nate is involved in numerous dangerous self-destructive and anti-social behavior including substance abuse, damage to property (graffiti), hanging from 'El' tracks, truancy & rule breaking. Nate is extremely at risk. Without immediate intervention, Nate may engage in anti-social behavior which will lead to police involvement. Nate needs assistance immediately." R.3-1 at 182-83.

[3] The relevant statutory provision states, in pertinent part, that "the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate education unit. . . . " 20 U.S.C. § 1415(b)(2); *see also* 34 C.F.R. § 300.507.

be maintained during the proceedings.[4] On September 28, the School, despite the Parents' request, expelled Nathan until the following semester. The School did offer him alternative, non-special education services during the period of his expulsion.

B. Level I Administrative Hearing

On October 17, the Parents sought an emergency order of stay-put placement from the Level I hearing officer. The officer ordered the School to return Nathan to school pending the outcome of the proceedings. Nathan returned to school on November 6; he had missed 27 days.

On January 11, 1996, the Level I hearing officer issued her opinion. She stated that Nathan's misconduct was not related to his handicap and that his one semester expulsion was appropriate. She further held, however, that the School was obliged to continue his special education services during his expulsion.

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[4] The "stay-put" provision of the IDEA, described in 20 U.S.C. § 1415(e)(3), states as follows:

> (3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415.

C. Level II Administrative Hearing

Before the Level II hearing officer, the School appealed the ruling that it needed to provide special education services to Nathan during his expulsion. The Parents also appealed, seeking compensatory education for the 27 days Nathan had missed between September 13 and November 6. On June 26, the Level II hearing officer affirmed the Level I hearing officer's decision and determined that the School had to provide special education services during Nathan's expulsion and compensatory services for the 27 days Nathan already had missed.

D. District Court Holding

The School then asked the district court to review the decision that it needed to provide Nathan with special education services during his expulsion. The Parents counterclaimed for attorneys' fees. The court first granted the School's motion for summary judgment based on *Doe v. Board of Education of Oak Park*, which held that the school did not need to provide special education services to a disabled student who was expelled for reasons unrelated to his disability. 115 F.3d at 1277-79. The court then denied the Parents' cross-motion for summary judgment for attorneys' fees.[5]

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[5] The district court's order of July 9, 1997, states in full:

> Plaintiff's motion for summary judgment (7-1) is granted on the basis of *John Doe vs. Board of Education of Oak Park, et al.* No. 96-3014, 1997 WL 289023 (7th Cir. May 27, 1997). Defendant's cross-motion for summary judgment (11-1) is denied. Accordingly, judgment is entered in favor of plaintiff and against

In a subsequent order, the court denied the Parents' motion for reconsideration. Under *Doe*, the court held, the School was the prevailing party.[6] The Parents were not the prevailing party, the court concluded, because they did not receive relief in the form of a judgment or settlement. *See Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464, 469 (7th Cir. 1996) (holding that a party must obtain an enforceable judgment, consent decree, or settlement against the party from whom fees are sought), *cert. denied*, 520 U.S. 1198 (1997). Finally, the court stated that a subsequent amendment to the IDEA[7] did

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> defendants. Any pending motion in this case is terminated as moot. Status hearing set for July 17, 1997 is vacated.

R.40.

[6] Attorneys' fees may be awarded to a prevailing party under the IDEA. As 20 U.S.C. § 1415(e)(4)(B) explains in pertinent part:

> (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B).

[7] In 1997, Congress amended the IDEA to require free appropriate public education for disabled students who were expelled:

1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the

not have a retroactive effect that would alter its conclusion.[8]

Nathan never received his one semester expulsion. When the district court issued its opinion, Nathan was a senior in high school; in June 1998, Nathan graduated.

Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1412. This court has stated that the amendment to the IDEA does not have retroactive effect for actions that occurred prior to the amendment. *See Doe*, 115 F.3d at 1283. Nathan's misconduct and attempted expulsion occurred prior to the amendment and thus it does not affect this case.

[8] The district court's second order, issued August 12, 1997, states:

Defendants, Richard and Nancy R.'s Rule 59 and 60 motion is denied. The plaintiff was the prevailing party pursuant to *Doe vs. Board of Educ.*, 115 F.3d [1273] (7th Cir. 1997), and any subsequent change in the IDEA does not have a retroactive effect on this conclusion. *Id.* at 1283. The defendants were not the prevailing parties because any relief that they received was not in the form of a judgment or settlement. *See Downers Grove Grade Sch. Dist No. 58 v. Steven L.*, 89 F.3d 464, 469 (7th Cir. 1996).

R.46.

II

DISCUSSION

A. Jurisdiction

Because Nathan has graduated from high school, we must first address whether this court has jurisdiction to hear this appeal. If a case becomes moot while on appeal, this court loses its jurisdiction to decide the merits of the action. *See In re Smith*, 964 F.2d 636, 637 (7th Cir. 1992); *Commodity Futures Trading Comm'n v. Board of Trade of Chicago*, 701 F.2d 653, 656 (7th Cir. 1983). We shall address this question in two parts: the claim for special education services and the claim for attorneys' fees for the administrative proceeding.

1.

The Parents argue that when the district court reached its decision, the case was already moot. They submit that, at the time the district court reached its decision, Nathan was about to start his senior year and had not been expelled. He had already received his compensatory services. We do not reach this question because, even if the case was not moot when the district court issued its opinion, the action is now moot due to Nathan's graduation from high school. Nathan graduated from high school in 1998, and no action this court might take would affect his or the School's rights. *See Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (stating that judgment for the plaintiffs would have afforded them no relief whatsoever and thus the action was moot); *Honig v. Doe*, 484 U.S. 305, 317 (1988) (holding that courts may

only adjudicate actual, ongoing controversies); *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318-19 (7th Cir. 1992) (stating that the test for mootness is whether the relief sought would affect a legal interest of the parties and deciding that a graduated high school student's legal interest could still be affected by the disposition because the plaintiff sought the return of an award the student received while in high school). Therefore, we vacate the district court's judgment and remand for the district court to dismiss. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss."); *Jordan v. Indiana High Sch. Athletic Ass'n, Inc.*, 16 F.3d 785, 787 (7th Cir. 1994) (explaining that if a case becomes moot then the judgment below must be vacated and dismissed).

The School argues that, when a case becomes moot on the merits, the party no longer has a claim for attorneys' fees. *See Lewis*, 494 U.S. at 480.[9] Because we would need to consider the merits to determine whether the Parents are prevailing parties, we agree that we cannot

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[9] The court in *Lewis* stated that, under 42 U.S.C. § 1988, an interest in attorneys' fees is insufficient to create an Article III case or controversy where none existed on the merits of the underlying claim. The court then held that, when a claim on the merits is moot, a claim for attorneys' fees based on the merits is also moot. This court has also held that § 1415(e)(4) should be interpreted consistently with § 1988. *See Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464, 468 (7th Cir. 1996).

decide whether the Parents would be entitled to attorneys' fees from the proceedings in the district court.

2.

We still can decide whether the Parents' claim for attorneys' fees from the invocation of the stay-put placement is valid because that claim is related solely to the administrative proceedings. This circuit previously has held that a party may file an independent suit in the district court to recover attorneys' fees from an IDEA administrative proceeding.[10] *See Brown v. Griggsville Community Unit Sch. Dist. No. 4*, 12 F.3d 681, 683-84 (7th Cir. 1993). In the district court, the School requested relief on the merits, and the Parents cross-claimed for attorneys' fees. The Parents' claim for attorneys' fees stems solely from the imposition of the stay-put placement, which is part of the administrative hearing. Thus, the Parents' claim is sufficient to allow this court to decide whether they are prevailing parties and entitled to attorneys' fees. We may consider only their claim for attorneys' fees stemming from the imposition of the stay-put placement because any other decision would go to the merits of the action which are now moot.

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[10] In fact, the only means by which a party may recover attorneys' fees for the administrative proceedings is through the district court because the statute only authorizes the courts, and not the administrative hearing officer, to award the attorneys' fees. *See* § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardians of a child or youth with a disability who is the prevailing party.").

B. Prevailing Parties

To determine whether the Parents are entitled to attorneys' fees we must ask whether they prevailed. The term "prevailing party" under 20 U.S.C. § 1415(e)(4)(B) has the same meaning as the phrase does in 42 U.S.C. § 1988. *See Steven L.*, 89 F.3d at 468. According to the Supreme Court, a party prevails under § 1988 if he obtains at least some relief on the merits of his claim such as an enforceable judgment, consent decree, or settlement. *See Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The relief granted must "materially alter[ ] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12; *see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (holding that under § 1988 the plaintiff must at least "be able to point to a resolution of the dispute which change[d] the legal relationship between itself and the defendant").

The relief the Parents received, and the basis of their claim here, was the application of the stay-put provision. They argue that, because the Level I hearing officer granted the emergency order of stay-put placement and because Nathan stayed in school until he graduated, without expulsion, they are the prevailing party. However, this de facto "win" does not rise to the level of an enforceable judgment, consent decree, or settlement that materially alters the relationship between the parties. The relief the Parents received was only interim in nature, and this circuit previously has held that the receipt of interim relief does not qualify a party for attorneys' fees. *See Hunger v. Leininger*, 15 F.3d 664, 670 (7th Cir.), *cert. denied*, 513 U.S. 839 (1994). Indeed, we also have stated

explicitly that invocation of the stay-put provision of the IDEA does not entitle the party to attorneys' fees. *See Steven L.*, 89 F.3d at 469.

Conclusion

The judgment of the district court on the merits is vacated as moot and remanded for dismissal. The denial of summary judgment for the Parents on the issue of attorneys' fees is affirmed. The School may recover its costs in this court.

AFFIRMED in part; VACATED and REMANDED in part

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge

Elaine E. Bucklo

Case Number 96 C 4581

Date August 12, 1997

Case Title

Board of Ed. Vs. Illinois State Board of Ed., et al.

* * * *

(10) [X] [Other docket entry] Defendants, Richard and Nancy R.'s Rule 59 and 60 motion is denied. The plaintiff was the prevailing party pursuant to Doe Vs. Board of Educ., 115 F.3d (7th Cir. 1997), and any subsequent change in the IDEA does not have a retroactive effect on this conclusion. Id. at 1283. The defendants were not the prevailing parties because any relief that they received was not in the form of a judgment or settlement. See Downers Grove Grade Sch. Dist No. 58 V. Steven L., 89 F.3d 464, 469 (7th Cir. 1996).

* * *

APPENDIX C

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge

Elaine E. Bucklo

Case Number 96 C 4581

Date July 9, 1997

Case Title

Board of Education of Oak Park Vs.
Illinois State Board, et al.

* * *

(10) [X] [Other docket entry] Plaintiff's motion for summary judgment (7-1) is granted on the basis of John Doe Vs. Board of Education of Oak Park, et al. No. 96-3014, 1997 WL 289023 (7th Cir. May 27, 1997). Defendant's cross-motion for summary judgment (11-1) is denied. Accordingly, judgment is entered in favor of plaintiff and against defendants. Any pending motion in this case is terminated as moot. Status hearing set for July 17, 1997 is vacated.

* * *

APPENDIX D

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Board of Education of Oak Park

Vs.

Illinois State Board of Education, et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 96 C 4581

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. Judgment is, therefore, entered in favor of plaintiff and against defendants.

July 9, 1997
Date

Michael W. Dobbins
Clerk

/s/ Mathew P. John
(By) Deputy Clerk

APPENDIX E

ILLINOIS STATE BOARD OF EDUCATION

IN THE MATTER OF THE)
SPECIAL EDUCATION)
OF)
)
NATHAN R)
)

LEVEL II REVIEW

APPEARANCES:

FOR THE PARENTS:

Margie Best Attorney
Richard R Father

FOR THE OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200:

John A. Relias Attorney

Angela R. Murphy
Level II Hearing Officer
55 West Wacher Drive, 9th Floor
Chicago, IL 60601

I. INTRODUCTION

The Level I decision in this matter was rendered on January 11, 1996. The school district's appeal of this decision was filed on January 24, 1996. The parents' appeal was filed February 9, 1996.

By agreement, the Level II hearing was scheduled for March 15, 1996, and oral argument was heard on that date. Because the Level II reviewing officer's copy of the record was temporarily lost in the mail, the record had to be pieced together with the aid of the parties (chiefly the district) and the Level I hearing officer. At the Level II

hearing, the parties came to an agreement regarding which documents constituted the complete Level I record. The district agreed to provide both the reviewing officer and the parents with copies of several documents that were not yet in the reviewing officer's possession. Those documents were received by the reviewing officer on March 19, 1996. (The certified copy of the record, which had been lost for weeks, was finally delivered to the reviewing officer on March 21.)

The district filed a pre-hearing brief on February 28. The parents chose to file a post-hearing brief. The district reserved its right to file a reply brief if it deemed that a reply was necessary. With the consent of the district, the due date for the parents' brief was extended to May 1. The parents' brief was received May 1, and the district's reply was received May 4.

II. BASIS FOR THE APPEAL – AS STATED IN NOTICES OF APPEAL

A. The School District

Appeal Issues

The School District hereby appeals from the following portions of the Level I decision:

1. The Level I Hearing Officer's decision that IDEA's stay-put provision, 20 U.S.C. 1145(e)(3) precluded the School District from expelling Nathan Reed after the School District made a proper determination that the student's misconduct was not related to his handicapping condition and while due

process proceedings are pending (Level I Dec. 9-11)

2. The Level I Hearing Officer's decision that although the School District had the right to expel Nathan R for one semester it was required to continue his special education and related services in conformance with his IEP; that the School District's proposed Ombudsman placement was not a proper alternative; and that the School District's position that pursuant to *Doe v. Maher* 793 F.2d 1470, (9th Cir. 1986), *aff'd as modified, Honig v. Doe,* 487 U.S. 305 (1988) no services at all were required to be provided to Nathan because it was properly determined that his misconduct was not related to his handicapping condition was incorrect (Id. at 18-28).

3. The Level I Hearing Officer's order that during Nathan's period of expulsion, that School District is ordered to concurrently provide an appropriate public school education to Nathan in an alternative setting in which his current IEP will be fully implemented (Id. at 26)

4. The Level I Hearing Officer's conclusion that the School District's actions provided Nathan's parents with an expectation that the School District would provide Nathan with a special education program consistent with existing law once he was expelled. (Id. at 21-23)

Relief Requested

The School District requests that the Level I decision regarding the imposition of no expulsion penalty be reversed as follows:

1. The Level I Hearing Officer find that no educational service is required to be provided to Nathan because his misconduct was determined to be unrelated to his handicapping condition.
2. In the alternative, if some educational services must be provided, that the Level II Hearing Officer find that the School District is not required to fully implement Nathan's IEP and that the Ombudsman program is sufficient.
3. The the Level II Hearing Officer find that since Nathan's parents knew by September 26, 1995 that the School District was only offering the Ombudsman program, they had no reasonable expectation that the School District was offering any other program.

B. The Parents

Appeal Issues

Parents wish to correct the following portions of the Level I Decision, and believe they should be changed for the noted reasons:

a. Issue #1 on page 3 of the Decision is incorrect. Parents did not object to the 10 day suspension. Parents objected to Nathan's suspension *for more than ten days.* Nathan was supposed to be suspended for ten days,

from September 13, 1995. In fact, Nathan was suspended for more than 10 days, until September 28th, when he was expelled. Parents clarified this issue numerous times.

b. Parents did not dispute expulsion *per se*, but the District's termination of appropriate IEP services and violations of parents' rights re: changes in placements, and the fact that the Board expelled during "stay-put".

c. Denial of Compensatory services; page 26 Order #5. The Hearing Officer found that Nathan was illegally excluded from school from September 27, 1995 to November 6, 1995, approximately 27 school days, until she *ordered* the District to return him to the program to which he was entitled. However, provision of services Nathan was entitled to, from November 6th on, does not provide him compensatory services for the special education and related services to which he was entitled for the 27 days he was illegally denied service. Providing services Nathan was already entitled to does not compensate him for services illegally denied.

Relief Requested

Parents request the following relief:

a. that the issues be correctly stated;

b. that compensatory services be ordered for the 27 days Nathan was illegally denied special education and related services, through additional counseling and academic assistance.

III. BACKGROUND

The child in this case is a special education student who, during the 1995-1996 school year, was placed in a tenth grade self-contained BD class and received psychotherapy services one period per week. On September 13, 1995, school officials discovered that he had brought marijuana to school in his shoe. He was suspended for ten days, with a recommendation for expulsion. The district held a staffing, which concluded that the child's misconduct was unrelated to his disability. On September 26, 1995, his parents filed a request for a due process hearing. On September 28, 1995, the school board met in executive session and expelled him for the rest of the semester. On October 30, 1995, a Level I hearing officer granted the parents' motion for an emergency stay-put order pending the outcome of the due process hearing. In accordance with this decision, the child was returned to his special education placement, and his related services were resumed, as of November 6, 1995.

The Level I hearing officer found that the district had the right to expel the child, and further found that the child's misconduct was not a manifestation of his disability. She rejected, however, the district's argument that, since the child's behavior was not related to his disability, the district was not obligated to provide any educational services. She based her conclusion on OSEP Memorandum 95-16, dated April 26, 1995, 22 IDELR 531. This memorandum was developed by the United States Department of Education to clarify the requirements under federal law for the discipline of students with disabilities. The memorandum states that, even where a disciplinary expulsion results from conduct unrelated to a

child's disability, a school district is obligated to continue to provide "a program of appropriate educational services that is individually designed to meet his or her unique learning needs." 22 IDELR at 536.

The Level I hearing officer also based her decision on an expansive reading of the landmark case *Honig v. Doe*, 484 U.S. 305 (1988). The hearing officer extended the reasoning in *Honig* to cover the instant case, and found that the district had an obligation to provide special education services during an expulsion even in cases where the child's misconduct did not arise out of his disability.

Honig grew out of the Ninth Circuit Court of appeals case *Doe v. Maher*, 793 F. 2d 1470 (9th Cir. 1986), *aff'd as modified, Honig v. Doe*, 484 U.S. 305 (1988). In *Honig*, the Supreme Court held that a school district could not exclude disabled children from the classroom for conduct that grew out of their disabilities. In *Maher*, the Court of Appeals addressed the additional question of whether a handicapped child can be expelled in cases where the child's misconduct is properly determined *not* to be a manifestation of his handicap. The *Maher* court concluded that, in such cases, the school district may indeed expel the child and may also suspend all educational services during the expulsion.

A month after the Level I decision was rendered, Judge Korcoras in *Doe v. Board of Education of Oak Park & River Forest High School District No. 200*, 94 C 6449, (hereinafter referred to as *Doe I*) ruled that, once a multidisciplinary staffing determines that misconduct is not related to a student's disability, a school district may

expel the student and provide no educational services. Korcoras ruled that, where misconduct was unrelated to the child's disability, neither *Honig* nor IDEA applies. He further ruled that IDEA's stay-put provision does not prohibit the imposition of the expulsion.

On April 19, 1996, two months after issuing *Doe I*, Judge Korcoras entered an opinion (hereinafter referred to as *Doe II*), on the plaintiff's motions for reconsideration. The court focused its discussion on a recently published OSEP opinion letter (923 IDELR 894-95) that addressed the issue of whether a school district must continue to provide services to special education children who have been properly expelled. OSEP concluded that, under IDEA, a free appropriate public education (FAPE) must be made available to all eligible children with disabilities, without making an exception for children who have been expelled. Having reviewed OSEP's position. Judge Korcoras somewhat grudgingly reversed himself on this point, saying:

> Although we do not wholly agree with the policies endorsed by the OSEP opinion letter, we do recognize that the positions taken by OSEP are entitled to deference and that the issue described in the OSEP opinion letter is virtually indistinguishable from the case at bar. . . . Pursuant to OSEP's policy and reading of the IDEA, the defendant was required to provide a free appropriate public education to Doe, as a disabled student, for the duration of his expulsion. This was so even though Doe's misconduct was assessed as being unrelated to his disability.

IV. FINDINGS AND CONCLUSIONS

A. The applicable law (District's Appeal Issues 2 and 3)

In the reviewing officer's judgment, a strong argument can be made that *Doe II* is not the "better rule" on the issue of whether a school district may terminate all education services during the disciplinary expulsion of a special education student who was expelled for conduct that is not a manifestation of his disability. Indeed, the problems created by forcing a school district to offer special education services for a student who was expelled for conduct unrelated to his disability are summarized by Judge Korcoras himself in *Doe I*:

> The disabled student would effectively be entitled to an unlimited exemption from such punishments. Such an occurrence is not only patently unfair to students with no disabilities who are treated more harshly, it likewise teaches the wrong lesson to students with unrelated disabilities who receive a "blank check" to behave in any manner they select. From the standpoint of the school district, it is further unjust to require the expenditure of already strained resources to provide an education to a disabled student who is sanctioned for conduct not linked to any disability. 94 C 6449.

To paraphrase Judge Korcoras in *Doe II*, however, positions taken by a federal court in this jurisdiction are entitled to deference. In my view, it would be an abuse of discretion not to follow the court's reasoning in *Doe II*.

The district's duty under *Doe II* is clear. In that case, Judge Korcoras ruled that "the defendant was required to

provide a free appropriate public education to Doe, as a disabled student, for the duration of his expulsion. . . . even though Doe's misconduct was assessed as being unrelated to his disability," 94C6449. In the instant case, a disabled student was expelled due to misconduct unrelated to his disability, yet the district did not provide him with any educational services during his expulsion. The district argues in its post-hearing brief that *Doe II* is not controlling in the instant case since the district did offer Nathan two alternative educational programs. For reasons discussed in Part D below, the reviewing officer rejects this argument and finds that, under *Doe II*, the district was required to provide Nathan with a special education program and related services during his expulsion.

B. IDEA's stay-put provision (District's Appeal Issue 1)

The district points out in its reply brief that Judge Korcoras's holding in *Doe I* that the stay-put provision of IDEA does not apply when the student's misconduct is unrelated to his disability, is not affected by his reversal on the issue of educational services during an expulsion. The district argues that the stay-put provision should not preclude the school from expelling the child after it made a proper non-relatedness determination.

In *Doe I*, Judge Korcoras held that the stay-put provision "does not expressly apply to stay expulsion where the student's misconduct is unrelated to his disability," (Slip Opinion, p. 11). In my reading of *Doe II*, the district is correct in stating that this holding was unaffected by

the court's reversal on the issue of educational services. Thus under both *Doe I* and *Doe II*, the district's decision to expel Nathan was proper, since the decision was made after a multi-disciplinary staffing had determined that his misconduct was not a manifestation of his disability.

C. The parents' expectations that the district would offer special education services during expulsion (District Appeal Issue 4)

The reviewing officer finds that the record does not support the Level I hearing officer's conclusion that the district's actions provided the parents with a rational expectation that the district would provide Nathan with a special education program once he was expelled.

D. The effect of offering alternate services

In its post-hearing brief, the district asserts that the educational alternatives that it offered to Nathan, consisting of tutoring and Ombudsman, co-incidentally comply with OSEP Memorandum 95-16, which provides:

> During the period of disciplinary exclusion from school, each disabled student must continue to be offered a program of appropriate educational services that is designed to meet his or her unique learning needs. Such services may be provided in the home, in an alternative school, or in another setting. 22 IDELR at 536.

The district maintains that "the vast majority of Nathan's academic goals from his then-current IEP could have been addressed" either in the one-on-one tutoring setting or in the Ombudsman program. (Reply brief, p. 3-4).

Ombudsman is, by the district's admission, "an alternative *non-special education* program." (District Pre-hearing Brief, p.2) and did not include any related services. The offer of tutoring was vague and informal[1]. At the time that these alternate placements were offered to the child, the district was firm in its conviction that it was not legally required to provide special education services to him, or indeed any educational services at all. The district did not intend to offer special education services to him and did not pretend that it was doing so. It is disingenuous of the district to claim now that the non-special education programs that the school offered in the fall of 1995 could possibly have met the requirements of a free appropriate public education for a special education student.

The district further argues that *Doe II* applies only where no educational services have been offered. The district points out that, even though it had maintained that the school was not required to provide any educational services to Nathan, the district had in fact offered two alternatives. The district contends that, because it offered these educational alternatives to the child, *Doe II* is not on point and is therefore not controlling.

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[1] The only evidence that the district ever offered tutoring appears in a letter, dated September 26, 1995, from the parents' attorney to Superintendent Offermann. In that letter, Ms. Best says, "I understand that one of your staff called Nathan and informed him that he should meet the teacher at the library, as Nathan would now be switched to 'homebound' tutoring". (Level I, District Exhibit XVI). Apparently it was never even committed to writing.

Doe II specifically required that the district in that case "provide a free appropriate public education to Doe, as a disabled student, for the duration of his expulsion . . . even though Doe's misconduct was assessed as being unrelated to his disability" 94 C 6449. In the reviewing officer's judgment, in the context of special education, a "free *appropriate* public education" (FAPE) means more than "an alternative educational program." It means a special education program with related services in conformance with an IEP. The reviewing officer finds that neither of the alternative settings that the district offered to the child meets the requirements of a FAPE. An expulsion is clearly a change in placement. The reviewing officer finds that, if the district is making a change in the placement of a special education child, it must hold an MDC for the purpose of devising an alternative placement that conforms to his IEP. That was not done in Nathan's case.

E. Compensatory services (Parents' Appeal Issues 2-3)

Doe II requires that the district provide the child with a FAPE for the duration of his expulsion. Since neither a special education program nor related services were provided to Nathan from the date of his expulsion until the Level I stay-put order became effective on November 6, 1995, the district must provide some sort of compensatory services. The parents' rejection of both the Ombudsman and the tutoring programs, neither of which was a special education program, does not preclude their claim for compensatory education.

The district argues that there is no justification for ordering day-for-day compensation for the time missed. The district points out that "there was absolutely no evidence presented at the Level I or the Level II hearing that Nathan did not receive an appropriate education even with his removal from school" (Reply brief, p. 2). The reviewing officer finds that the district's argument has some merit. Surely a claim for damages, which the parents' claim for compensation essentially is, requires some proof of damages. It would be unfair to the district to require it to supply day-for-day compensation when a lesser degree of compensation might be all that is required.

On the other hand, it would be manifestly unfair to deny the child all compensation simply because the parents did not supply a bill of particulars. The parents do have the burden of proof on this issue, a burden which they failed to sustain. There are elements in this case, however, that suggest even without further proof that the alleged need for compensation is legitimate. For example, the nature of the child's disability, behavior disorder, is such that teachers often observe regression in behavior when special education services are suspended or withdrawn. The fact that the child's special education placement (a self-contained BD class) is fairly restrictive suggests that the disability is serious, as does the fact his IEP calls for weekly psychotherapy sessions.

It is impossible at this point for the reviewing officer to quantify the child's need for compensation. For me to retain jurisdiction to accept additional evidence on this issue seems to me to be a time-consuming, costly and

unnecessary approach. In my view, the parties themselves are capable of determining the child's needs for compensation, and I order that they do so at an MDC to be held no later than 30 days after the issuance of this decision. I hereby direct the parties, in making their determination, to take into account the nature of the child's disability, the seriousness of his disability, and the fairly substantial amount of time that he was deprived of special education services. I would also remind the parties that the purpose of compensation is to help the child and not to punish the district, which acted in good faith.

F. Remaining issues of Parents' Appeal (Nos. 2-3 a & b)

On the remaining factual issues, the reviewing officer finds as follows. The record supports the parents' position in their Notice of Appeal: that is, that they did not object to the 10 day suspension but rather to a suspension of more than 10 days; and that they did not object to expulsion per se but rather to the termination of special education programs and services during expulsion.

ORDER

The school district shall offer the child appropriate academic assistance and counseling consistent with his IEP, in order to compensate him for the special education and related services that were denied to him. The nature and amount of this compensation shall be determined at

an MDC, to be held no later than 30 days from the issuance of this decision.

/s/ Angela R. Murphy
Angela R. Murpy
Level II Reviewing Officer

Chicago, Illinois
Date: June 26, 1996

APPENDIX F

LEVEL I IMPARTIAL DUE PROCESS HEARING DECISION

On Thursday, December 14, 1995, a Level I Impartial Due Process Hearing was convened on behalf of N. in the conference room of the administrative offices of the school district involved. The hearing officer has jurisdiction to hear and decide this matter under Section 14-8.02(g) of 105 *Illinois Compiled Statute* 5 (School Code of Illinois), 34 CFR 300.506-509 of the P.L. 101-476 Regulations and 23 Illinois Administrative Code 226 Subpart J.

The parties were informed of their rights under Section 14-8.02(g) of 105 *Illinois Compiled Statute* 5, 34 CFR 300.508, and 23 Illinois Administrative Code 226 Subpart J.

This hearing was requested by the parents (petitioner) on September 26, 1995. The Illinois State Board of Education received the request for a hearing on September 26, 1995. The hearing officer was notified on October 13, 1995 of her appointment. The timeline for the hearing referred to in the above-referenced rules was not adhered to due to the facts that:

1. The hearing officer did not receive notice of her appointment until October 13, 1995, and;

2. The hearing officer was asked to rule on parents' pre-hearing motion (and supporting memorandum of law) for stay-put placement pending the due process hearing and the school district's motion opposing such placement. The school district was unwilling to mediate the above-referenced dispute.

3. The independent psychological evaluator selected by the parents to conduct an evaluation of N. and prepare a report for the hearing was not available until after December 11, 1995.

In addition, the ten school days after the hearing within which the hearing officer's decision was due included a holiday period when school was not in session. Accordingly, the decision date became January 11, 1996.

Subpoenas were drawn by the parents' attorney and issued by the hearing officer to compel attendance by the eight witnesses other than the parents, their attorney and the evaluator. Seven of the eight witnesses subpoenaed testified.

THE ISSUES PRESENTED BEFORE THIS HEARING OFFICER BY THE PARTIES WERE:

1. WHETHER THE SCHOOL DISTRICT EXCEEDED ITS DISCIPLINARY AUTHORITY WHEN IT SUSPENDED N. FOR TEN DAYS FOR POSSESSING AN ILLEGAL SUBSTANCE.

2. WHETHER THE SCHOOL DISTRICT EXCEEDED ITS DISCIPLINARY AUTHORITY BY EXPELLING N. FOR A SEMESTER FOR POSSESSING AN ILLEGAL SUBSTANCE AFTER A DUE PROCESS HEARING REQUEST WAS FILED BY HIS PARENTS.

3. WHETHER THE SCHOOL DISTRICT EXCEEDED ITS DISCIPLINARY AUTHORITY BY EXPELLING N. BASED ON A STAFFING AT WHICH HIS MISCONDUCT WAS DETERMINED TO BE UNRELATED TO HIS HANDICAPPING CONDITION.

4. WHETHER THE SCHOOL DISTRICT EXCEEDED ITS DISCIPLINARY AUTHORITY BY EXPELLING

N. AND MANDATING AN ALTERNATIVE PLACEMENT AND SUBSTANCE ABUSE COUNSELING (AT PARENTAL EXPENSE) WITHOUT EVALUATION OF N. AND WITHOUT PARENTAL AND STUDENT AGREEMENT TO CHANGE HIS PLACEMENT OR 1995-96 IEP.

The parents were informed of their rights and responsibilities with respect to the hearing in writing by the hearing officer and by the Illinois State Board of Education. They were represented by counsel. The hearing was closed and they requested that N. not be present at the hearing.

Prior to the hearing, the hearing officer granted parents' pre-hearing motion for emergency order of stay-put and returned N. to his BD placement as per his MDC of January 30, 1995 pending the outcome of the due process hearing.

The hearing officer denied the school district's pre-hearing motion to exclude the report and testimony of the parents' independent evaluator from the Level I hearing of December 14, 1995. The basis for the decision was that the report and testimony were deemed material to the issue of whether N.'s behavior was related to his handicapping condition. At the conclusion of the hearing, the hearing officer requested the attorney for the school district to send her copies of three court decisions which were germane to the legal issues in the case. These were provided along with a cover letter referring to a fourth case, a copy of which was also supplied. Parents' attorney objected to the letter as argumentative and to the provision of the fourth case as being new material not submitted within the five-day rule, moving to strike both the

letter and the newly-submitted case on December 20, 1995. The hearing officer herein denies the motion to strike the fourth case on the basis that it is referred to extensively within one of the other cases timely submitted and does not constitute new material.

The hearing officer also denies the motion to strike the cover letter. The cover letter merely provides clarification and will not be construed for its probative value.

BACKGROUND

The following is a chronological summary of events in the case culminating in the current Level I Due Process Hearing:

1. N. is a 16-year old special education student in the tenth grade at a public high school. During his freshman year, he was evaluated and identified with a behavior/emotional disorder. After an MDC/IEP conference on January 30, 1995, he was placed in a self-contained BD class at the high school and designated to receive one period per week of psychotherapy. This placement was continued in the fall of the 1995-96 school year.

2. On September 13, 1995, a security officer inside the school was told by a student that N. was outside school grounds showing other students a plastic bag. A patrolling security officer, together with the inside officer, found N. and asked him to return to the school. On school premises, he was questioned and searched for drug paraphernalia. Three bags of what was later identified by police as marijuana were found in his shoes. On the same day, N. was suspended from school for ten days for violating the school's Code of Conduct by possessing an illegal

substance. A disciplinary (expulsion) hearing was scheduled for September 19, 1995.

3. On September 19, 1995, an expulsion hearing was held at which N. confirmed that the bags were in his possession. He admitted telling others about the drugs, but denied showing the substances to anyone or having the intention to use them at school.

4. Also on September 19, 1995, the school district held a staffing, which concluded that N.'s misconduct (drug possession) was unrelated to his disability (behavior disorder). No additional evaluation was recommended. The staff, N.'s parents and therapist concurred that N.'s current BD placement as delineated in the January 30, 1995 IEP was beneficial to him. A report of this meeting was forwarded to the Administrative Review Committee.

5. On September 26, 1995, N.'s parents filed a request for a due process hearing. They requested the district not to change or terminate N.'s special education placement during the pendency of the proceedings.

6. However, on September 28, 1995, the school board met in executive session and expelled N. for the first semester of the 1995-96 school year, or until January 23, 1996.

7. The hearing officer received notice of her appointment on October 13, 1995.

8. On October 16, 1995, the terms of the expulsion were referred to in a letter from the associate principal to N.'s parents. They included a directive for N. to attend an alternative special education program, the Ombudsman Program, at district expense, for the remainder of the first semester. In addition, a required minimum of five sessions of substance abuse counseling by a certified therapist at parents'

expense was mandated to be completed and documented before N.'s return to school for second semester. Parents contend that the school's sole provision for N. to attend the Ombudsman Program during his expulsion was not an appropriate special education placement, and that no option to continue N.'s related social work services was offered by the school district. Since the school's educational mandate was not acceptable to N.'s parents, N. did not receive any educational services from September 13, 1995 (the first day of his suspension), until he was returned to his BD placement on November 6, 1995, following the hearing officer's order on October 30, 1995, granting parent's motion to stay that placement (see #12 of this section).

9. November 13, 1995 was the date originally set for the due process hearing. By agreement of the parties, the date was extended to December 14, 1995, to accommodate the availability of an independent educational evaluator selected by the parents.

10. The parents' pre-hearing motion for stay-put order and supporting memorandum of law was filed and received on October 17, 1995. In their motion, parents contended that the district's decision to implement a one-semester expulsion of their son on September 28, 1995, after their request for a due process hearing on September 26, 1995, was in contravention of the stay-put provision of IDEA Part B, 20 U.S.C. §1415(e)(3), the policy of the United States Department of Education (OSERS), and the U.S. Supreme Court case of *Honig v. Doe*, 484 U.S 305, 108 S. Ct. 592 (1988).

11. The school district's motion in opposition to stay-put and supporting memorandum of law was filed and received on October 23, 1995, as was parents' reply to the district's memorandum of law. The school

district's motion contended that the suspension and semester-long expulsion of N. for his misconduct was lawful, citing the district's Code of Conduct and the statutory goals of keeping schools drug-free as promulgated in the Safe School Act of 1994, 103 P.L. 227, Title VII(144), 105 ILCS 5/2-3.92, 105 ILCS 5/27-20.2. Furthermore, they believed the alternative education program offered to N. during his expulsion was an appropriate educational placement since he would receive credit for completing it.

12. In fact, school authorities claimed the right to expel N. and to cease to provide *all* educational services, since the misconduct for which he was expelled was determined in a staffing not to be a manifestation of his handicap. The cited *Doe v. Maher*, 793 F. 2d 1470 (9th Circuit, 1986) as precedent for their position. Accordingly, they requested dismissal of parents' pre-hearing motion. On October 30, 1995, the hearing officer granted parents' pre-hearing motion. She agreed with their contention that the stay-put provision of IDEA and OSERS policy dictated that N. be returned to his stay-put placement (BD classroom) pending the outcome of the due process hearing, at which the propriety of the school's manifestation determination (whether the misconduct for which N. was expelled was related to his disability) would be decided.

FINDINGS OF FACT/CONCLUSIONS OF LAW

All findings of fact which can be viewed as conclusions of law are hereby deemed so. Conversely, all conclusions of law which can be considered findings of fact should be considered as such. Based on the evidence and testimony presented during the hearing, the independent hearing

officer makes the following findings of fact and conclusions of law:

I. THE PREPONDERENCE OF THE EVIDENCE ESTABLISHES THAT THE SUSPENSION OF N. FROM SEPTEMBER 13, 1995 TO SEPTEMBER 26, 1995 FOR POSSESSING AN ILLEGAL SUBSTANCE WAS PROPER.

A. On September 13, 1995, N. was found to be in possession of three bags containing 11 grams of a substance determined by law enforcement authorities to be marijuana. He received written notice from the school district suspending him for ten days for a Class III Violation of the School Code of Conduct.

B. At the disciplinary (expulsion) hearing conducted on September 19, 1995, by authority of Paragraph 22.6 of Article 6 of the *School Code of Illinois*, N. admitted that he had the drugs in his possession and knew it was illegal but said he had no intention of smoking the marijuana at school.

C. The State of Illinois, through its school system, has the right to discipline N. for the possession and use of illegal substances and to take action for violation of rules. The high school district's Code of Conduct, which prohibits possession of any illegal substances and subjects violators to a ten-day suspension and possible expulsion, was admittedly violated by N.'S possession of marijuana. School authorities were within their rights when they suspended N. for ten days.

II. THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THE SUSPENSION OF N. FOR SEPTEMBER 27 AND SEPTEMBER 28, 1995 – TWO DAYS BEYOND THE TEN-DAY LIMIT – AND THE

EXPULSION OF N. FROM SEPTEMBER 29, 1995 UNTIL HIS RETURN TO THE CLASSROOM ON NOVEMBER 6, 1995 BY ORDER OF THE HEARING OFFICER AFTER HIS PARENTS' REQUEST OF SEPTEMBER 26, 1995 FOR A DUE PROCESS HEARING IS A VIOLATION OF THE STAY-PUT PROVISION OF IDEA. THE POLICY OF OSERS, AND THE SUPREME COURT'S DECISION IN HONIG V. DOE, 108 S. Ct. 592 (1988):

A. According to the stay-put provision of IDEA, Part B, 20 U.S.C. §1415 (e)(3) as interpreted in 34 C.F. R. 300.513(a) and 23 Illinois Administrative Code 226.636(g), N. is a handicapped child within the definition of IDEA. He has a classified BD disorder and a special education placement with related services for the 1995-96 school year. The stay-put provision of IDEA, Part B, 20 U.S.C. §1415 (e)(3), provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then current educational placement of such child . . . " the unequivocal meaning of this statute as it applies to N. is that during the pendency of the due process proceedings initiated on September 26, 1995, he was to remain in his last-agreed-to placement as per the IEP of January 30, 1995, which was updated after the staffing of September 19, 1995. No change of placement was recommended or requested at that staffing, nor was any evaluation made thereafter.

B. The policy of the United States Department of Education, as interpreted by OSERS, is that "regardless of when the expulsion hearing takes place, once a parent has filed for due process

proceeding the district refrains from implementing the expulsion of the student. This procedure would be consistent with the pendency provisions of Part B." 22 IDELR 371 (1994). A more recent interpretation of the same position is found in 22 IDELR 531 (1995), at 535 Answer #7: "If the students' parents initiate an impartial due process hearing in connection with a proposed disciplinary exclusion or other change in placement, and the misconduct does not involve the bringing of a firearm to school . . . , the 'pendency' provision of IDEA requires that the student must remain in his or her current educational placement until the completion of all proceedings." Here, a firearm was not involved. Parents initiated a due process hearing on September 26, 1995, the tenth day of N.'s suspension. A disciplinary hearing had been held on September 19, 1995, and a staffing held immediately after to determine relatedness. Parents knew the school board was going to review the record and probably recommend expulsion on September 28, 1995. N.'s parents had the right to request a due process hearing, which request stayed N.'s placement pending the outcome of that hearing.

C. The U.S. Supreme Court decision in *Honig v. Doe*, 108 S. Ct. 592 (1988), stated that Congressional intent behind passage of IDEA was to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally-disturbed students, from school." 108 S.Ct. at 604. The case is cited for the premise that "the 'stay-put' provision prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive

conduct growing out of their disabilities during the pendency of review proceedings." 108 S.Ct. at 595. Since the Court would not rewrite the statute "to read a 'dangerousness' exception into the stay-put provision," 108 S. Ct. at 604, exclusion of disabled students for conduct growing out of their disabilities is forbidden, barring injunctive relief which can be sought if necessary. Since the determination of whether the conduct herein, the possession of marijuana, grows out of N.'s disability, is the subject of the due process hearing, *Honig* can be interpreted to require that N.'s placement cannot be changed during the pendency of the proceedings to decide this issue without violating the stay-put provision. "The Department of Education has adopted the position first espoused in 1980 by its Office of Civil Rights that a suspension of up to ten school days does not amount to a 'change in placement' prohibited by Section §1415(e)(3) . . . we believe the agency correctly determined that a suspension in excess of ten days does constitute a prohibited 'change in placement' . . . " 108 S. Ct. at 605, fn. 8. The school district suspended N. for ten days from September 13, to September 26, 1995. By continuing the suspension on September 27 and September 28 and proceeding to implement a one-semester expulsion on September 29, the school district changed N.'s placement in violation of the stay-put provision. The protections of IDEA and a presumption in favor of the current educational placement dictated that N. should remain in his BD placement pending the outcome of the hearing, an action the hearing officer implemented on October 30, 1995. Since the hearing officer's action corrected the illegal removal of

N. from his placement, no compensatory services are due N. for the period of his removal.

III. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS THE CONCLUSION THAT THE ONE-SEMESTER EXPULSION OF N. WAS AN APPROPRIATE SANCTION IMPOSED BY THE SCHOOL DISTRICT.

A. The decision reached at the manifestation staffing on September 19, 1995, that the misconduct of N. was unrelated to his handicapping condition was the legal basis for his expulsion.

1. The law is clear that the handicapped child cannot be suspended for more than ten days or expelled for misbehavior that is a manifestation of his handicap even if the conduct is disruptive or dangerous. Conversely, a disabled child can be expelled for misbehavior that is not a manifestation of his handicap. *Doe v. Maher*, 793 F. 2d 1470, (9th Cir. 1986), at 1481; *aff'd as modified, Honig v. Doe*, 487 U.S. 305, 108 S.Ct. 592 (1988). 23 Illinois Administrative Code 226.40(b) is consistent with this case law in providing that a child receiving special education "shall not be expelled for behavior or a condition which is, or results from, an exceptional characteristic as defined in The School Code . . . " The school board's policy under which N. was expelled also complied with legal requirements in its statement that "if the determination of the MDC is that the misconduct is not a result of a student's disability and the placement was found to be appropriate, the student may be expelled from school." Board Policy 5114-1.

2. The Ninth Circuit defined a handicapped child's conduct as a manifestation of his disability "only if the handicap significantly impairs the child's behavioral controls. Although this definition may, depending on the circumstances, include the conduct of handicapped children who possess the raw capacity to conform their behavior to prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons." *Doe v. Maher*, 793 F.2d at 1480, fn. 8. N.'s conduct is an example of behavior that bears just such an attenuated relationship to his handicap.

3. The hearing officer finds that the criteria for establishing relatedness were not met by the facts as required by law. The conduct of N for which he was expelled was bringing three dime bags of marijuana to school premises in his shoe. The decision to do so was a conscious, planned action that was not clearly caused by his impulsivity, anxiety or depression, the handicapping characteristics of N's behavior disorder as defined in his IEP of January 30, 1995. He admitted at the expulsion hearing that he knew it was illegal

to smoke marijuana at school and was planning on going into the city to get high with his friends (see Student Incident Report of September 13, 1995).

B. The finding reached at the manifestation staffing of September 19, 1995 that the misconduct of N. was unrelated to his handicapping condition was supported by the testimony of parents' witnesses.

1. The social worker's report in N.'s IEP of January 30, 1995, described N. as "very impulsive . . . involved in self defeating behaviors . . . including substance abuse" and that "behavioral factors are preventing him from obtaining an education." The testimony of the social worker at the due process hearing was largely based on the information he received from N.'s parents that N. was depressed from an early age, and that he had a substance abuse problem pre-dating high school. He did not determine that N.'s possession of marijuana was caused by his depression, only that N. appeared to be a depressed young man.

2. Parents' attorney attempted to connect N.'s behavior to his disability through one of the goals on his IEP, "to learn appropriate skills to deal with self-defeating behaviors." The fifth objective under that goal states the "student will decrease reliance on narcotic or alcoholic substances as a coping mechanism." (School's Record, Exhibit VB). Since that objective is part of the IEP, she reasoned that the disability must be inextricably connected to the misbehavior.

3. However, the psychologist who conducted the initial evaluation of N. for the January 30, 1995 IEP meeting testified that the goals could have been pulled from a bank of goals and added to the IEP after the placement decision had been reached. In fact, the pages listing specific goals and objectives were not numbered and were typed after the meeting. The psychologist testified that the elevation of MMPI scales in her January evaluation report "indicated a potential for [N.'s] developing a substance abuse problem or [being] at risk." (Transcript, page 97).

   Though she stated that she "always view[s] that which is included in the goals as being essential to describe the handicapping condition," she could not unequivocally connect N.'s behavior to his BD handicap either (Transcript, page 76). Her conclusion was that "to determine if N. was acting out of depression there would [need to] be an evaluation conducted by a qualified substance abuse counselor." (Transcript, page 97).

4. In fact, N.'s mother testified that when she saw the objective of decreasing reliance on substance abuse, she thought it referred to a drug education program that was to be implemented as part of N.'s special education program. She claimed to have no indication before the September 13, 1995 incident that her son was actually involved with drugs. (Transcript, page 415). Indeed, the evaluation requested by the parents was not to evaluate N.'s substance abuse involvement, only the sufficiency of his educational placement.

5. A confusing form that was admittedly added to N.'s IEP after the meeting in January tied the goals of his IEP to his handicapping condition, but the same form also stated that "possession of a substance" was behavior not attributed to the handicapping condition. (School's Record, Exhibit IIIJ). The double message of this form sheds no light on any possible nexus between the behavior disorder and the conduct, as parents' attorney claims, except to suggest that drug possession cannot ever be related to the handicap.

6. The special education director and a part-time psychologist, who were only present at the September manifestation staffing, both testified at the hearing that they saw the behavior as unrelated to the disability because it was a conscious, criminal act that could not cause a child to be in need of special education in and of itself. Their opinion was that regular education students, including honor students, could possess drugs as well for any variety of reasons.

7. Only N.'s parents and the parents' evaluator testified that they viewed his behavior as related to his disabling condition, based on his history of poor judgment and risk-taking behavior. The testimony of parents' evaluator was not convincing to the hearing officer on the issue of relatedness, only in her observations that N. exhibited the adverse effects of a behavior disorder.

C. The handicapped child's behavior was properly determined not to be a manifestation of his handicap. A "proper determination is one that

is arrived at by an IEP team meeting, according to the correct procedures . . . or by a hearing officer" *Doe v. Maher,* 793 Fed. 2d at 1492, fn. 9.

1. The manifestation decision must be made by "a group of persons knowledgeable about the student" 22 IDELR 531 at 533, OSEP Memorandum 95-16 (April 26, 1995). See also 34 CFR § 300.533(a)(3).

2. The composition of the participants at the manifestation staffing, as in all IEP meetings, must include a special education representative of the district, the child's teacher, and one or both of the child's parents, 23 IAC 226.560(b), 34 CFR § 300.344(a)(1)-(5).

3. The hearing officer believes that the relatedness determination, which occurred at the September 19, 1995 staffing, was made by a knowledgeable group. It included N.'s parents, one of his teachers and the special education supervisor of the district. Parents' attorney maintained that the absence of the original participants from the January 30, 1995 initial IEP staffing at the September staffing violated N.'s rights. The hearing officer does not agree.

4. The hearing officer believes that procedural safeguards were not fully followed regarding the relatedness determination as interpreted in 22 IDELR 531 at 535. Adequate prior written notice was given to N.'s parents about the hearing, but such notice was not accurate regarding the specific purpose of the meeting. Also, the basis for the determination and their due process right to appeal that determination were never

explained in writing to them. However, parents instituted an impartial due process hearing on September 26, 1995 and N.'s mother testified at the hearing she understood that expulsion could follow the determination. In effect, no actual harm resulted from the school district's failure to fully conform to N.'s procedural rights in this instance.

D. Under the IDEA, Article 14 of the School Code and their respective implementing regulations, the hearing officer believes that the school district's failure to conduct an independent evaluation of N.'s educational needs before expelling him was *not* a violation of his rights. The manifestation decision, which found that N.'s behavior was *unrelated* to his disability, recommended no change of placement, no modifications to N.'s IEP, and specified no behavior management plan. Therefore, an evaluation was not required.

IV. THOUGH THE SCHOOL DISTRICT HAD THE RIGHT to EXPEL N., IT DID NOT COMPLY WITH ITS OBLIGATION TO CONTINUE HIS SPECIAL EDUCATION AND RELATED SERVICES IN CONFORMANCE WITH HIS IEP DURING THE EXPULSION AS REQUIRED BY OSERS' INTERPRETATION OF IDEA, CASE LAW AND ILLINOIS ADMINISTRATIVE CODE REGULATIONS.

A. OSEP and OSERS interpret *Honig* and IDEA to require the school to provide a free appropriate public education during expulsions even if a disabled child's behavior is not related to his disability. The purpose of OSEP Memorandum 95-16 of April 26, 1995, 22 IDELR 531 was to clarify the requirements for the discipline of students with disabilities. According to that

memo, "a district is obligated to continue the provision of educational services for students whose misconduct is not related to their disabilities during disciplinary expulsions and suspensions of more than ten days." 22 IDELR at 532, ans. 7. "During the period of disciplinary exclusion from school, each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her unique learning needs. Such services may be provided in the home, in an alternative school, or in another setting." 22 IDELR at 536, ans. 8. "Today, as school safety takes on increasing importance for all of us, we want to underscore the compatibility of guaranteeing the rights of students with disabilities with the goal of school safety." 22 IDELR at 533.

B. The hearing officer finds that the interpretation of OSERS controls the legal obligation of the school to provide services in the Seventh Circuit per *Metropolitan School District of Wayne Township v. Davila*, 969 F. 2d 485 (7th Cir. 1992). In this case, an Indiana school district sued OSERS on its position expressed in a letter to the school that IDEA requires states to provide services to disabled children expelled for an extended period of time for unrelated behavior. The district asserted that "OSERS position places a large financial burden on school districts and that districts are entitled to notice of the proposed rule and the opportunity to comment." 969 F. 2d at 487. The Seventh Circuit disagreed with the school district. It ruled that "the letter announced OSERS' construction of the IDEA, and hence is an interpretive rule that does not trigger the APA's [Administrative Procedures

Act's] notice and comment requirements." 969 F. 2d at 489. The hearing officer agrees. The rule states what OSERS thinks the statute means and reminds parties of the procedures and standards the agency will apply to the exercise of its discretionary authority. The attorney for the school district herein reminded this hearing officer that she is not bound by OSERS interpretation because "interpretive rules, although they are entitled to deference, do not bind reviewing courts." 969 F. 2d at 490. Though the hearing officer is not bound by the agency's interpretation, the court in *Metropolitan* noted that "parties regulated by the statute certainly are." 969 F. 2d at 493. The interpretive rule "reminds affected parties of existing duties." 969 F. 2d at 489. Accordingly, the hearing officer concludes that the school district had the duty to continue N.'s special education and related services. The expulsion was not incompatible with OSERS' interpretation that the school needs to provide N. an appropriate program, individually designed to meet his unique learning needs (his IEP) in an alternative setting.

C. The hearing officer finds that the school district was obligated to continue to provide N. a free appropriate public education by implementing his IEP of January 30, 1995 (as reviewed and readopted on September 19, 1995) during the expulsion period.

1. IDEA confers upon disabled students an enforceable substantive right to a free appropriate public education per *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The method for implementing this requirement is the IEP, which "sets out

the child's present educational performance, establishes annual and short-term objectives for improvement in that performance and describes the specially-designed instruction and services that will enable the child to meet those objectives." 20 U.S.C. § 1401(19). The staffing of September 19, 1995 recommended no changes in, or modifications to, N.'s IEP. The original goals of January 30, 1995 were reviewed and incorporated into the manifestation report from that meeting, and the participants were unanimous in their agreement that the BD self-contained placement should stand. Parents did not object. In fact, the comment was made on the September staffing report that N.'s mother felt the BD program had been very helpful to her son. (School's Record, Exhibit IC).

2. The school district takes the approach that it had no obligation to provide *any* educational services to N. upon proper expulsion for behavior unrelated to his handicapping condition, citing the following from *Doe v. Maher*, 793 F. 2d. 1470 (9th Cir. 1986), at 1482: "The school district may cease providing all educational services – just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that is not so." Yet in its own phone call to N.'s home offering library tutoring beginning on the 11th day of the suspension, its own letters to parents on September 29, 1995, October 16, 1995 and the board's expulsion policy (implemented in 1990 and amended

in 1994) under which N. was expelled, the district contradicts this position by offering to provide services under certain conditions.

3. The letter of September 29, 1995 from the superintendent to N.'s parents confirmed the board's action in expelling their son for the first semester of the 1995-96 school year, but offered to "hold the expulsion in abeyance contingent on the student's enrollment and regular attendance in an alternative education program to be determined by Special Education; student is to receive verifiable counseling and provide proof of that counseling upon returning to school." (Parents' Record, page 8). Parents enrolled their son in substance abuse counseling as per this letter.

4. At the time of N.'s expulsion, parents also received a copy of Board Policy 5114-1 on suspensions and expulsions which stated: "if the determination of the MDC is that the misconduct is not a result of the student's disability and the placement was found to be appropriate, the student may be expelled from school. The continued provision of special education programming or services shall be consistent with existing law." The assistant superintendent for special education testified at the hearing that the wording of the board policy was changed in 1994 to state that the continued provision of special education shall be "at the discretion of the board." (Transcript, pp. 323-328). Whatever the wording of the policy, parents' expectations concerning their son's prospective education during expulsion were that he

would be provided with *special education* as legally permissable [sic], even if that determination was at the discretion of the board. N.'s father testified at the hearing that he thought expulsion was appropriate for his son. "Expulsion, yes; but provision of special education program consistent with existing law. My interpretation of that is that he would be given a special education alternative. That is the whole basis on which we are having this hearing." (Transcript, page 467).

5. Parents' anticipations were also shaped by informal discussions with school personnel. N.'s father testified at the hearing that he had some conversations with the dean regarding what educational services would be provided. "We talked about two that I recall. One was Ombudsman." (Transcript, page 449). N.'s mother testified that no formal discussions or written recommendations were made regarding educational placement of N. at the September 19, 1995 staffing, but that she also had informal discussions with the dean afterwards at which a part-time computer program was described to her as an educational possibility for her son. (Transcript, page 371). Also, parents' attorney wrote to the school district's attorney on October 11, 1995 and October 16, 1995, requesting a special education placement for N. (Parents Record, pp. 13-14).

6. On October 16, 1995, N.'s mother called the school asking the assistant superintendent of special education for "a clear direction in

writing as to what the school was recommending." (Transcript, page 381). A meeting was arranged with the associate school principal on that day and a letter prepared for N.'s mother stating that "the alternative education program determined by Special Education is the Ombudsman program." (Transcript, page 382). Both parents testified that they visited the Ombudsman program and felt it was not structured or academically challenging enough for their son. The school's attorney does not contest the fact that the program's literature states that it is not an individually-designed special education program.

7. At the hearing, school's attorney pointed out that parents knew as early as September 26, 1995 that Ombudsman was the only educational alternative the school was recommending for N. when their attorney rejected the school's informal oral offer to provide it before N. was expelled. The letter of September 26, 1995 from parents attorney, requesting a due process hearing for N. stated "my clients do not agree to homebound, or to placement of [N.] at the Ombudsman program, a part-time non-special education program." (Parents' Record, page 1). However, the hearing officer believes the parents are not barred from claiming later that the school district did not fulfill its obligation to offer special education programming (as opposed to a non-special education program such as Ombudsman) because of this letter.

8. Under the rationale of *Doe v. Maher,* the district asserts it had no obligation to do anything educationally for N. Yet, it was the district's contention, promulgated by the assistant superintendent for special education who testified at the hearing, that the expulsion made N. a "regular" education student, entitled to be offered a "regular" program option such as Ombudsman at the discretion of the school board, (Transcript, page 330). This approach is also rejected by the hearing officer as confusing and contradictory. If N. truly became a "regular" education student, the school district could be considered to have unilaterally terminated N.'s placement, necessitating a conference to completely review his educational program in accordance with 23 Illinois Administrative Code 226.595(a)-(c) and formulate a specific transition plan. The district's notice to parents of September 15, 1995 (see School's exhibit II) actually stated that the improper purpose of the September 19, 1995 meeting was to "develop your child's transition plan." This statement of purpose was a typographical error made by temporary secretarial help, according to testimony given by the behavior disorder program chair at the hearing. No termination of placement, but only determinations regarding relatedness and appropriate placement actually occurred at that meeting.

9. Apparently, both parents thought, based on the superintendent's letter of September 29, 1995, the principal's letter of October 16, 1995, informal discussions with the dean before the expulsion and their reading of the

board's policy on expulsion, that some formal recommendation for continued special education would be forthcoming from the district, even if their attorney had rejected the Ombudsman program in her letter of September 26, 1995. The hearing officer agrees. There was an obligation for the school to provide appropriate educational services to N. in a program individually designed to meet his unique learning needs in an alternative setting during the expulsion.

D. 23 IAC 226.40(a) speaks to the obligation of the school district to provide a disabled student with an appropriate education in its statement that: "No exceptional child . . . may be permanently excluded from the public schools, either by direct action by the board of education, [or] by indication of the district's inability to provide an educational program . . . " By not providing N. with an appropriate educational program while he was expelled, the school district was effectively excluding him from this right.

ORDERS

#1-3 below are effective immediately upon receipt of this order:

1. The school district is directed to implement the expulsion of N. for the remainder of the first semester of the 1995-96 school year as per the board's action at its September 28, 1995 meeting (as described in the superintendent's letter of September 29, 1995 to N.'s parents).

2. During the period of expulsion, the school district is ordered to concurrently provide an appropriate public school education to N. in an alternative setting in which his current IEP (of January 30, 1995 as readopted on September 19, 1995) will be fully implemented.

3. As it may be needed to properly implement this order, the school district shall convene an IEP meeting at which arrangements for transportation at district expense shall be formulated.

In accordance with the timeliness and directives of 23 IAC 226.542, 23 IAC 226.544(c)(1) and (2), and 23 IAC 226.578(b):

4. At the annual review of N.'s placement, the school district shall consider the results and recommendations of the independent educational evaluation obtained by N.'s parents at their expense and presented at the due process hearing.

5. Since the hearing officer returned N. to school pending the outcome of the due process hearing, the school district shall *not* be required to provide compensatory services to N. for the period during which he was illegally excluded from school (September 27, 1995 – November 6, 1995).

6. The district shall submit proof of compliance with this order to the regulatory and Operations Section of the Illinois State Board of Education, 100 North First Street, Springfield, Illinois 62777, within thirty (30) days from the receipt of this decision

APPEAL INSTRUCTIONS

If either party disagrees with this decision, they may, within thirty (30) days of the receipt of the decision,

appeal to the Illinois State Board of Education, Legal Department W-475, 100 North First Street, Springfield, Illinois 62777-1111, Attention: Jeannie Schulze. The appeal may be filed by mail or in person and *must include* the following:

1. A statement that the appeal of a Level I decision is being requested;
2. A statement setting forth the portions of the Level I decision with which the party disagrees;
3. A statement setting forth the reasons why the decision should be changed;
4. A statement of the relief requested;
5. A statement requesting oral argument, if desired;
   NOTE: A new hearing is not required. A hearing will only be convened if specifically requested by a party and only for the purpose of receiving additional evidence or oral argument.
6. A statement indicating that a copy of the request for the appeal has been served on the other party;
7. The name, address, and telephone number of both parties to the Level I hearing.

Within ten (10) days of filing an appeal, or within ten (10) days of the receipt of the notice of an appeal, the district shall transmit to the State Board of Education, Legal Department, in Chicago, a complete administrative record of the hearing, including transcript, records, and reports presented at the hearing, other exhibits and materials presented, and a copy of the Level I decision. The

district shall simultaneously send a complete administrative record to the parents.

Respectfully submitted,

_____
Hermine S. Leiderman
Level I Impartial Due Process
Hearing Officer

Date: _____

HSL/m

cc: Ms. Bobbie Reguly, ISBE

APPENDIX G

ILLINOIS STATE BOARD OF EDUCATION

In re: The Special Education of Nathan R. and Oak Park and River Forest High School District #200	))))))	Level One Due Process Hearing Before Hermine S. Liederman, Independent Hearing Officer

PRE-HEARING DECISION ON PARENTS' MOTION FOR EMERGENCY ORDER OF STAY-PUT

The parents, on behalf of their son, Nathan R. filed a pre-hearing motion through their attorney requesting this hearing officer to order Oak Park and River Forest High School District #200 to return the boy to the self-contained BD classroom at Oak Park and River Forest High School (hereinafter referred to as OPRF), as per his MDC/IEP placement of January 30, 1995. They also request this hearing officer to stay such placement during the pendency of the due process proceedings.

FACTS AS PRESENTED TO THE HEARING OFFICER BY BOTH PARTIES

1. Nathan R. is a 16-year old special education student in the tenth grade at OPRF. During his freshman year, he was evaluated and identified with a behavior/emotional disorder. After an MDC/IEP conference on January 30, 1995, he was placed in a self-contained BD class at OPRF, and designated to receive one period per week of psychotherapy. This placement was continued in the fall of the 1995-96 school year.

2. On September 13, 1995, a security officer inside the school was told by a student that Nathan R. was outside school grounds showing other students a plastic bag. A patrolling security officer, together with the inside officer, found Nathan and asked him to return to school. On school premises, he was questioned and searched for drug paraphernalia. Three bags of what was later identified by police as marijuana were found in his shoes. On the same day, Nathan was suspended from school for ten days for violating the school's Code of Conduct by possessing an illegal substance. A disciplinary (explusion [sic]) hearing was scheduled for September 19, 1995.

3. On September 19, 1995, an expulsion hearing was held at which Nathan confirmed that the bags were in his possession. He admitted telling others about the drugs, but denied showing the substances to anyone or having the intention to use them at school.

4. Also on September 19, 1995, the school district held a staffing, which concluded that Nathan's misconduct (drug possession) was unrelated to his disability (behavior disorder). No additional evaluation was recommended. The staff, Nathan's parents and therapist concurred that Nathan's current BD placement as delineated in the January 30, 1995 IEP was beneficial to him. A report of this meeting was forwarded to the Administrative Review Committee.

5. On September 26, 1995, Nathan's parents filed a request for a due process hearing. They requested the district not to change or terminate Nathan's special education placement during the pendency of the proceedings.

6. On September 28, 1995, the school board met in executive session and expelled Nathan for the entire

first semester of the 1995-96 school year, or until January 23, 1996.

7. On October 16, 1995, the terms of the expulsion were referred to in a letter from the associate principal to Mr. and Mrs. R. They included a directive for Nathan to attend an alternative special education program, the Ombudsman Program, at district expense, for the remainder of the first semester. In addition, a required minimum of five sessions of substance abuse counseling by a certified therapist at parents' expense was mandated to be completed and documented before Nathan's return to school for second semester.

8. The hearing officer received notice of her appointment on October 13, 1995.

9. The date of November 13, 1995 was set for the due process hearing by agreement of the parties.

10. The parents' motion under consideration and supporting memorandum of law was filed and received on October 17, 1995.

11. The school district's motion in opposition and supporting memorandum of law was filed and received on October 23, 1995, as was parents' reply to the district's memorandum of law.

12. Parents contend that the district's decision to implement a one-semester explusion [sic] of their son on September 28, 1995, after their request for a due process hearing on September 26, 1995, is in contravention of the stay-put provision of IDEA part B, 20 U.S.C. § 1415(e)(3), the policy of the United States Department of Education (OSERS), and the U.S. Supreme Court Case of *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988).

13. Parents also contend that the school's sole provision for Nathan to attend the Ombudsman Program during his expulsion is not an appropriate special education placement, and that no option to continue Nathan's related social work services has been made by the school district. Since the school's educational mandate is not acceptable to Nathan's parents, Nathan has not received any educational services since September 13, 1995.

14. The school district contends that the suspension and semester-long expulsion of Nathan for his misconduct was lawful, citing the district's Code of Conduct and the statutory goals of keeping schools drug-free as promulgated in the Safe School Act of 1994, 103 P.L. 227, Title VII (144), 105 ILCS 5/2-3.92, 105 ILCS 5/27-20.2. Furthermore, they believe the alternative education program offered to Nathan during his expulsion is an appropriate educational placement since he would received [sic] credit for completing it.

15. In fact, school authorities claim the right to expel Nathan and to cease to provide *all* educational services, since the misconduct for which he was expelled was determined in a staffing not to be a manifestation of his handicap. They cite *Doe v. Maher*, 793 F.2nd 1470 (9th Circuit, 1986) as precedent for their position. Accordingly, they request dismissal of parents' pre-hearing motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The hearing officer finds that the expulsion of Nathan R. (on September 28, 1995) after his parents' request on (September 26, 1995) for a due process hearing is a violation of:

    a. the stay-put provision of IDEA, Part B, 20 U.S.C. § 1415(e)(3) as interpreted in 34 C.F.R.

300.513(a) and 23 Illinois Administrative Code 226.636(g);
b. the policy of the United States Department of Education as interpreted by OSERS; and
c. the U.S. Supreme Court decision in *Honig v. Doe* 108 S.Ct. 592 (1988).

2. The State of Illinois, through its school system, has the right to discipline students for the possession and use of illegal substances and to take action for violation of rules. The OPRF High School District's "Code of Conduct," which prohibits possession of any illegal substances and subjects violators to a ten-day suspension and possible expulsion, was admittedly violated by Nathan R. possessing of [sic] marijuana. School authorities were within their rights when they suspended Nathan for ten days. However, the power to promulgate extended suspensions and expulsions can not conflict with the higher authority of federal statute, regulatory interpretation of the statute and U.S. Supreme Court case law.

3. Nathan R. is a handicapped child within the definition of IDEA. He has a classified BD disorder and a special education placement with related services for the 1995-96 school year. The stay-put provision of IDEA, Part B, 20 U.S.C. § 1415(e)(3) provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then current educational placement of such child . . . " The unequivocal meaning of this statute as it applies to Nathan R. is that during the pendency of these due process proceedings initiated on September 26, 1995, he is to remain in the last-agreed-to placement as per his IEP of January 30, 1995, which was updated after the staffing of September 19, 1995. No change of

placement was recommended or requested at the September 19, 1995 staffing, nor was any evaluation made thereafter.

4. The effect of the semester-long expulsion of Nathan R. on September 28, 1995 and the school's proposal for his alternative education in the Ombudsman Program was to change his placement in violation of the stay-put provision and also to deprive him of a free appropriate public education to which he is entitled under IDEA, Part B, 20 U.S.C. § 1412(1) and (2) and the *Rowley* decision 458 U.S. 176, 102 S.Ct. 3034 (1982).

5. The Congressional intent behind passage of IDEA was to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally-disturbed students, from school." *Honig v. Doe* 108 S.Ct. 592, at 604 (1988). The case of *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), which OPRF cites for the premise that the school has a right to expel Nathan and cease delivery of all educational services because his misconduct does not result from his handicapping condition, is not controlling on the issue of whether Nathan's placement can by stayed. It is a proper issue for the hearing officer to decide after the due process hearing on November 13, 1995. In fact, the case of *Doe v. Maher* has been cited to represent the principle that an indefinite suspension in aid of expulsion constitutes a prohibited change in placement under IDEA, Part B, 20 U.S.C. § 1415(e)(3). See *Honig v. Doe* 108 S. Ct. 192 (1988), at 600.

6. The Department of Education, through OSERS, has adopted the position that "regardless of when the expulsion hearing takes place, once a parent has filed for a due process proceeding the district refrains from

implementing the expulsion of the student. This procedure would be consistent with the pendency provisions of Part B." 22 IDELR 371 (1994). It is also the policy of OSERS that under the FAPE requirement the school district "must continue to provide educational services to students with disabilities during periods of long-term suspension or expulsion from school for misconduct that is determined *not* to be a manifestation of their disability." 22 IDELR 372 (1994), (emphasis added). OSERS' inherent authority to interpret IDEA's Congressional intent that disabled students continue to receive educational services after expulsion is binding on the parties and creates a presumption in favor of the current placement barring a court challenge. See *Metropolitan School District of Way Township v. Davila* 969 F.2d 485 (7th Cir. 1992), at 493.

7. Nathan R.'s last-agreed-to placement was the self-contained BD classroom at Oak Park and River Forest High School. No evidence was presented to this hearing officer that Nathan presents a risk to himself or others in that placement. He was also receiving related services there once a week in accordance with his 1995-96 IEP.

ORDER

Accordingly, IT IS HEREBY ORDERED that Oak Park and River Forest High School District 200 immediately return Nathan R. to his self-contained tenth grade BD placement at OPRF and resume related services there as per his 1995-96 IEP, as mandated by IDEA, Part B, 26 U.S.C. § 1415(e)(3), pending the outcome of the due process hearing scheduled for November 13, 1995.

IT IS ALSO ORDERED that the school district provide copies of all Nathan R.'s records to his attorney forthwith, including the psychological evaluation conducted by the school district.

Respectfully submitted,

/s/ Hermine S. Leiderman
Hermine S. Leiderman
Independent Hearing Officer
October 30, 1995

APPENDIX H

BOARD OF EDUCATION OF THE AVON LAKE CITY SCHOOL DISTRICT, Plaintiff-Appellee, v. PATRICK M., BY AND THROUGH HIS PARENTS LLOYD AND FAITH M., Defendant-Appellant.

NO. 98-3848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

2000 U.S. App. LEXIS 11869

May 24, 2000, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION, SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS, PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT, IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT, THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: On Appeal from the United States District Court for the Northern District of Ohio, 97-00973, Gwin. 6-18-98.

DISPOSITION: Matter REMANDED as moot.

COUNSEL: For BOARD OF EDUCATION OF THE AVON LAKE CITY SCHOOL DISTRICT, Plaintiff-Appellee: Timothy J. Sheeran, Squire, Sanders & Dempsey, David K. Smith, Krista K. Keim, Means, Bichimer, Burkholder & Baker, Cleveland, OH.

For PATRICK M., Defendant-Appellant: Randy J. Blankenship, Robbins, Kelly, Palterson & Tucker, Cincinnati, OH.

For PATRICK M., Defendant-Appellant: Margie R. Best, Law Office of Margie Best, Oak Park, IL.

JUDGES: BEFORE: MARTIN, Chief Judge: KENNEDY and SUHRHEINRICH, Circuit Judges.

OPINION: PER CURIAM. Plaintiff Patrick M., by and through his Parents, Lloyd and Faith M. ("Parents"), appeal from the district court's order granting summary judgment to the Board of Education of the Avon Lake School District ("School District") in this suit arising under the Individuals With Disabilities Act ("IDEA"), *20 U.S.C. § 1400 et seq.* Although this case raises complicated and troubling questions, we do not decide them because the case is moot.

I.

Patrick M., now nineteen years old, has had academic and behavioral problems since he started school, in February 1989, while repeating the second grade, Patrick M. was diagnosed as learning disabled ("LD").[1] The School

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[1] Patrick also displayed behavioral problems early in his school career. Patrick's 1989 individualized Education Program indicated that Patrick was unable to stay focused when other activities were going on; that Patrick "very frequently" poked, tormented, and teased classmates; that Patrick "very frequently" lost attention when the teacher explained something; and that he had difficulty focusing on academic tasks.

District provided Patrick with special education services throughout his primary school years. Patrick continued to receive failing marks, but was nonetheless "assigned" to the third, fourth, fifth, sixth, seventh, and eight grades.

Despite consistent "lack of academic success and continued demonstration of attitudinal problems," Patrick's Attention Deficit Hyperactivity Disorder ("ADHD") went undetected until July 1994, when it was diagnosed by Dr. Kenneth A. DeLuca, a private psychologist, and Dr. Sanjay Parikh, a neurologist. Barbara Dalgleish, the school psychologist, received copies of their reports, including DeLuca's recommendation that Patrick needed individualized remediation for his Specific Learning Disabilities ("SSD"), accommodations for his ADHD, and counseling for his Oppositional Defiant Disorder ("ODD").

On September 26, 1994, Patrick's Individualized Education Program ("IEP") team concluded that Patrick was "SBD" and that he should be placed in the School's Transitional Learning Center ("TLC") program for the 1994-95 school year. In TLC, Patrick received special education services in English, math, social studies, and "reading supplement." However, Dalgloish testified that Patrick did not receive any LD services that year, because the School District decided that his behavior was impacting on his education more than his learning disability, and opted to address the behavioral issues first. Patrick's teacher in the TLC program was Linda Schanz, a SBD/SED (severe emotional disturbance) certified instructor with a Master's degree in counseling, Schanz did not have a LD certification, Patrick received no related services.

On April 12, 1995, Patrick brought two unloaded guns, ammunition, and a broken stiletto to school. The School District called the police, Mr. Hamilton, the Learwood Junior High School Principal, suspended Patrick from April 12, 1995, until May 5, 1995.[2] Patrick was incarcerated in the Lorain County Juvenile Detention Home from April 12 to May 3. On May 1, 1995, Hamilton and Dalgleish met, without notifying Parents, and issued a one-page IEP, but did not otherwise conduct a manifest determination hearing.[3] On May 8, 1995, School

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[2] The School had a scheduled spring break during this period.

[3] In its Response Brief, the School District claims that it did conduct a manifest determination hearing on May 1, 1995, and faults the SLRO for finding otherwise. Hamilton testified that he "felt that there was no way that it [the gun incident] had anything to do with his [Patrick's] disability." Yet he also testified that those present at the meeting did "not really" talk about the gun incident and its relationship to Pat's disability. Although the School District maintains that the May 1 meeting was a manifest determination hearing, only Dalgleish and Hamilton were present. Schanz's name is also listed on the May 1 IEP, but she testified that she was not at that meeting, Mrs. M testified, and the School does not dispute, that it did not inform her of the manifest determination hearing.

In the next breath the School District contends that Mrs. M declined to participate in the May 1, 1995 IEP meeting, giving her consent by telephone. In addition to being inconsistent with its previous admission, the School District has misrepresented the record. The May 1, 1995 IEP indicates that "Parent approved *program* via phone conference." (Emphasis added.) It is disingenuous for the School District to equate Mrs. M's "approval" of the May 1 "program" with her acquiescence to an earlier IEP, which stated: "parent waived *right to attend* and approved program via phone 6-7-94." (Emphasis added.)

Superintendent Dr. Clayton Dusek conducted an expulsion hearing and expelled Patrick from May 8 through November 16, 1995.

Patrick ultimately failed all of his eighth grade courses.

On June 16, 1995, Patrick was hospitalized for one night in a psychiatric unit following an outburst toward his father.

On August 11, 1995, Patrick had a court hearing related to the gun incident. Mrs. M. informed the court that they would be placing Patrick in a private residential school.

In early August, 1995, Dusek informed Mrs. M, that Patrick would be part of a new Severe Behavior Handicap ("SBH") unit at the high school. On August 23, 1995, Parents requested a due process hearing to address "the District's failure to provide appropriate special education and related services to Patrick, the District's termination of all special education and related services to Patrick, the District's refusal to fund residential placement to meet Patrick's complex and multiple disabilities, and other violations of the child and parental rights."

Patrick attended the Elan School in Poland Springs, Maine for his ninth and tenth grade years. The Elan School specializes in the education of students with learning disabilities and severe behavior handicaps.

See generally Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982).

An independent hearing officer ("IHO") conducted a duo process hearing in the summer of 1996. On January 15, 1997, the IHO denied Patrick's claim for reimbursement, holding that Parents "did not act reasonably in making a unilateral placement." The IHO found that the private placement was motivated exclusively by "the June 16, 1995 incident" and Parents' desire to avoid incarceration for Patrick. The IHO felt that the residential placement was not dictated by Patrick's educational problems, but rather by his "segregable medical, social, emotional or legal problems."

Parents appealed the IHO's decision to the State Board of Education. On March 18, 1997, the State Level Review Officer ("SLRO") reversed the IHO. After extensive fact findings, the SLRO concluded that the School District's individualized services for Patrick failed to satisfy the requirements of *29 U.S.C. § 1401(19)*. The SLRO held that the School District's eighth grade and proposed ninth grade individualized educational programs failed to accommodate Patrick's disabilities. The SLRO also faulted the School District for failing to make a manifest determination whether Patrick's behavior was related to his disability and held that Patrick was illegally suspended and expelled. The SLRO rejected the School District's argument that the Elan placement was inappropriate, stating that "the educational aspects of Elan cannot be denied in light of the lack of educational progress achieved in the Avon Lake City School District." The SLRO ordered that the School District reimburse Parents for Patrick's tuition at Elan School for both the 1995-96 and 1996-97 school years.

On May 6, 1997, the School District appealed to the federal district court pursuant to 20 U.S.C. § 1415(e). The School District asked the court to reverse the SLRO's award of reimbursement to Parents. Parents counter claimed under the Rehabilitation Act, *20 U.S.C. § 794* and *42 U.S.C. § 1983*.

On October 3, 1997, the School District filed a motion for summary judgment. Parents filed a response and cross-motion for summary judgment on October 30, 1997.

Meanwhile, the Elan School sued the School District and Parents in state court in Maine for breach of contract, in the amount of $71,971.04. On October 9, 1997, the School District entered into a compromise settlement for $50,000. Significantly, the School District obtained a full release for Parents without assignment of rights.[4]

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[4] The "Settlement and Release Agreement" provides in pertinent part:

> [4](b). Release of Lloyd and Faith McCardle [sic] in consideration of the payment made per paragraph 3 above, Elan hereby releases and forever discharges Lloyd and Faith McArdle from all actions, cause of actions, sums, debts and sums of money, claims and demands whatsoever, in law or equity, whether known or unknown, which either has ever had, now has, or may have, of any nature whatsoever, upon contract, statute, government rule or regulation or tort, from the beginning of the world to the date of this Settlement and Release Agreement, including, by way of example and not by way of limitation, all claims relating directly or indirectly from or asserted or which could be asserted in connection with the lawsuit above referred to or arising from the education and residential program of Patrick

The district court granted summary judgments to the School District on June 18, 1998. The court concluded:

> Upon review of the record in this case, the Court concludes that there is insufficient evidence to show that Petitioner Avon Lake violated the applicable provisions of the Individuals With Disabilities Act. *20 U.S.C. § 1401, et seq.* Accordingly, the court grants Petitioner Avon Lake's motion for summary judgment on the administrative record and reverses the decision of State Level Review Officer Armbruster. The Court further denies Respondents Patrick M. [sic] cross-motion for judgment as to attorney fees and costs.

The Court entered judgment the same day. The entry of judgment states: The Court has filed its memorandum and opinion in the above-captioned matter. Accordingly, *this action is hereby terminated* pursuant to Federal Rule of Civil Procedure 58." (Emphasis added.)

Parents appeal.

II.

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review. . . . And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When

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McCardle, including claims for Elan services, Elan personnel, and other personnel engaged by Elan.

> the lower court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Associated Gen. Contractors v. City of Columbus, 172 F.3d 411, 424 (6th Cir. 1999) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 137 L.Ed. 2d 170, 117 S. Ct. 1055 (1997)).

Mootness is a jurisdictional question. *See International Union v. Dana, Corp.*, 697 F.2d 718, 720 (6th Cir. 1993). When a case becomes moot, an Article III case or controversy no longer exists, depriving the courts of jurisdiction to hear the merits. *See Remus Joint Venture v. McAnally*, 116 F.3d 180, 184 (6th Cir. 1997).

As a general rule, the settlement of a dispute between the parties renders the case moot. *See Dana Corp.*, 697 F.2d at 721. The IDEA claim became moot on October 9, 1997, when the School District entered into the settlement and release with the Elan School. Although the School District settled only with the Elan school, the School District's right against Parents was derivative of Elan School's right against Parents. The School District obtained a full release of Elan's claims against Parents, however, with no assignment of rights. For this reason, the "nonadmission of liability" clause in the settlement agreement is irrelevant. This appeal is therefore moot.

The settlement also made Parents' Rehabilitation Act and § 1983 claims moot. *See Chuhron v. Walled Lake Consol. Schs.*, 1995 U.S. App. LEXIS 6348, No. 93-2621, 1995 WL 138882, at *2 (6th Cir. March 28, 1995) (unpublished per

curiam).[5] Indeed Parents' counsel stated at oral argument before this court that he thought there was a "strong argument that the appeal is moot," and that "the district court should have dismissed the whole case."

Thus, the case became moot in the district court, long before the district court entered judgment. Yet neither side raised the mootness issue. In their "Motion for Order Interim Attorney Fees and Costs," filed on October 30, 1997, along with their response and cross-motion for summary judgment, Parents stated as follows:

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[5] At first blush it appeared that the district court's June 18, 1998 entry of judgment was not a final order because it failed to adjudicate Parents' Rehabilitation Act and § 1983 claims. Absent certification for an interlocutory appeal under 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(B), an order disposing of fewer than all parties or claims is nonappealable. *See William B. Tanner Co. v. United States*, 575 F.2d 101, 102 (6th Cir. 1978) (per curiam). Although the entry of judgment states in pertinent part that "this action is hereby terminated pursuant to Federal Rule of Civil Procedure 58," (J.A. 43), the district court's characterization is not dispositive. *Cf. Liberty Mut. Ins. Co. Wetzel*, 424 U.S. 737, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976); *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7, 110 L. Ed. 2d 563, 110 S. Ct. 2658 (1990) (holding that the label used by the district court cannot control an order's appealability); *Clarke v. Mindis Metals, Inc.*, 1996 U.S App. LEXIS 27925, No. 95-5517, 1996 WL 616677 (Oct. 24, 1996) (unpublished). The entry of judgment also references the district court's memorandum and opinion, but there the district court granted summary judgment on the School District's claim under the IDEA and merely denied Parents "cross-motion for judgment as to attorney fees and costs."

Nonetheless, because the Rehabilitation Act and § 1983 claims were moot when the district court entered judgment, the order was final and our jurisdiction was preserved.

> The Plaintiff's one-count complaint was filed to avoid paying the costs of Patrick M.'s residential placement at Elan School, as ordered by the State Level Review Officer. Plaintiff has now paid the Elan School, and the Elan School placement has been at no cost to Patrick and his parents, as guaranteed by IDEA and as requested by Patrick and his parents. Defendant Patrick M. is, therefore, a prevailing party under IDEA, 20 U.S.C. § 1415e(4)(B) and as such is entitled to attorney fees and costs.
>
> The issue of payment for Elan has been in legal proceedings for over two years, and litigation continues on other counter-claims.
>
> Patrick seeks an order from this honorable Court granting his motion to file for interim fees, on the issue resolved, namely, the District's payment of Elan.

Parents did not mention that the payment was part of a settlement.

The School District filed the following memorandum in opposition to Parents' motion for order of interim attorney fees and costs:

> Parents' motion for attorney fees and costs should be denied; Parents are not and cannot be a prevailing party under *20 U.S.C. § 1415(E)(4)(B)* as this Court has yet to review the *merits* of this action. Nor can Parents circumvent this Court's *de novo* review by virtue of a settlement agreement to which they are not a party.

The School District also argued that the settlement agreement contained a nonadmission of liability by either

the Elan School or the School District.[6] The School District concluded that "The clear and unequivocal language of the Settlement Agreement precludes Parents from improperly using it as evidence of liability in this proceeding. Parents have no basis for prevailing party status under 20 U.S.C. § 1415(c)(f)(B) and cannot escape the *de novo* review of this Court." Memorandum in Opposition to Motion for Order of Interim Attorney Fees and Costs, (Dct. #42.)[7] Notably, the School District did not discuss the releases provision, which completely absolved Parents of any future liability.

In any event, it is clear that as on June 18, 1998, the date of the district court's judgment, the School District's IDEA claim was moot because of the settlement. The

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[6] The Settlement and Release Agreement provides in pertinent part:

> NON-ADMISSION OF LIABILITY. The parties agree that nothing in this Settlement and Release Agreement, nor any action to be taken pursuant hereto, shall constitute or be deemed to be evidence of an admission on the part of Elan or the District of an liability or wrongdoing whatsoever. Both Elan and the District specifically disclaim any liability alleged in such action. Elan is accepting and the District is paying the compromise amount for the sole purpose of avoiding further legal expense and associated costs and avoiding the uncertainties inherent in further litigation.

See Settlement and Release Agreement at P2 (copy attached to Appendix to Reply in Support of Motion for Judgment on the Record at Exhibit A) (Emphasis added).

[7] The document is not found in the J.A.

district court's judgment in favor of the School District is without effect.

Thus, the final decision in this case is the SLRO's decision in favor or [sic] parents. *See 20 U.S.C.A. § 1415(e)(1)* (West 1995).[8] Parents are therefore the prevailing party, and may be entitled to attorney's fees through the administrative level. *See 20 U.S.C.A. § 1415(e)(4)(B)* (West 1995)[9]; *Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 894-98 (6th Cir. 1988) (holding that parents who prevail of administrative level can bring separate cause of action under HCPA [predecessor of the IDEA] for an award of attorney's fees).

We leave it for the district court to decide whether attorney's fees should be awarded for the federal proceedings. We note that, for whatever reason, neither side bothered to raise the question of mootness. Meanwhile, this court and the district court were required to review a large and convoluted record while attempting to decipher the merits of this action. Counsels' behavior is not commendable. *See Dana, Corp.*, 697 F.2d at 724.

Having concluded this matter is moot, we **remand** to the district court for further proceedings consistent with this opinion.

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[8] The current version of this section is found at *20 U.S.C.A. § 1415(i)(1)(B)* (West 2000).

[9] The current version of this section is found at *20 U.S.C.A. § 1415(i)(3)(B)* (West 2000).

20 U.S.C. Sec. 1400(1997) et seq.

Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

20 U.S.C. § 1400(c)(2)(B)&(C)(1997)

Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

20 U.S.C. § 1400(d)(1997) Purposes

The purposes of this chapter are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1412(a)(1)(A)(1997)

In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3

> and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1415(e)(3)(A)

Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed

20 U.S.C. § 1415(e)(4)(B)

> (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

20 U.S.C. § 1415(i)(3)(B)(1997)

> Jurisdiction of district courts; attorneys' fees
>
> (B) Award of attorneys' fees
>
> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

20 U.S.C. § 1415(j)(1997) Maintenance of current educational placement Except as provided in subsection (k)(7)

of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

28 Sec. 1254. Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 Sec. 1331. Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1988(b)

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, (FOOTNOTE 1) the court, in its discretion, may

allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Supreme Court, U.S.
FILED
JUL 25 2000
CLERK

No. 99-1990

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

NATHAN R., by and through his parents and next friends, RICHARD AND NANCY R.,

Petitioners,

vs.

BOARD OF EDUCATION OF OAK PARK AND RIVER FOREST HIGH SCHOOL DISTRICT NO. 200,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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10 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Petitioners Needlessly Convolute The Question Presented For Review 1

II. There Is No Compelling Reason For Granting A Writ Of Certiorari 1

III. Even If The Question Presented By Petitioners Has Created A Conflict Among Courts Of Appeals, Petitioners Have Not Presented An Important Matter For This Court's Review 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Board of Educ. of the Avon Lake City Sch. Dist. v. Patrick M., No. 98-3848, 2000 U.S. App. LEXIS 11869 (6th Cir. May 24, 2000) 1, 2

Coalition For Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) 3

Haley v. Pataki, 106 F.3d 478 (2nd Cir. 1997) 2, 3

I.C. v. Mendham Township Bd. of Educ., 29 F.Supp.2d 214 (D.N.J. 1998) 3

Jarczynski v. St. Mary's County Pub Sch., 30 IDELR 38 (D. Md. 1999) 4

Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Nathan R., 199 F.3d 377 (7th Cir. 2000) 2, 4

Patrick G. v. City of Chicago Sch. Dist. No. 299, No. 94 C 3417, 1994 WL 715590, (N.D. Ill. Oct. 27, 1994), aff'd, 69 F.3d 540 (7th Cir. 1995) 5

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ARGUMENT

I. Petitioners Needlessly Convolute The Question Presented For Review.

Although not totally incorrect, Petitioner's formulation of the question presented could scarcely be more argumentative and confusing. Stated more succinctly, the question presented is:

> Whether a party that obtains interim relief in the form of the application of the IDEA's stay-put provision, but fails to obtain an enforceable judgment, settlement, or consent decree, is a prevailing party entitled to attorney's fees under the IDEA?

II. There Is No Compelling Reason For Granting A Writ Of Certiorari.

While neither controlling nor fully measuring this Court's discretion, compelling reasons for granting a writ of certiorari include a conflict between courts of appeals on an important matter, or a decision by a court of appeals on an important federal question that conflicts with a decision of this Court. *Sup. Ct. R. 10.* Neither of these reasons support Petitioners' request in this case.[1]

Petitioners erroneously contend that the Seventh Circuit's decision is in conflict with the Sixth Circuit's unpublished decision in Board of Educ. of the Avon Lake City Sch. Dist. v. Patrick M., No. 98-3848, 2000 U.S. App. LEXIS

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[1] Petitioners do not allege a conflict between the Seventh Circuit's decision and a decision of this Court.

11869 (6th Cir. May 24, 2000). Avon Lake is unrelated to the Seventh Circuit's decision. First, it did not involve the issue of whether invocation of the IDEA's stay-put provision gives rise to prevailing party status under the IDEA. Second, the Seventh Circuit's decision accords with Avon Lake because the Seventh Circuit also looked to the proceedings at the administrative-review level to determine the parents' entitlement to attorneys' fees upon finding that the federal court litigation was moot. Avon Lake, 2000 U.S. App. LEXIS at *15; Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Nathan R., 199 F.3d 377, 381-382 (7th Cir. 2000).

Third, and most importantly, the denial of attorneys' fees by the Seventh Circuit in this case was based on separate and wholly unrelated considerations. In Avon Lake, the Sixth Circuit awarded attorneys' fees because the administrative review officer ruled that the school district failed to offer the student an appropriate special education placement and ordered it to reimburse the cost of his private school tuition. Avon Lake, 2000 U.S. App. LEXIS at ** 12-15. In the instant case, the Seventh Circuit also found that attorney's fees may be awarded based on the outcome of administrative proceedings. Nathan R., 199 F.3d at 381-382. However, it denied Petitioners' fee request on the narrow basis of its prior holding that invocation of the IDEA's stay-put provision does not entitle a party to attorney's fees. Id. In so doing, the Seventh Circuit neither rejected nor contradicted the Sixth Circuit in Avon Lake. Indeed, it explicitly stated that a fee award could result from an administrative decision. Thus, while the Seventh Circuit rejected Petitioners' fee request, it did so for reasons that do no relate to, much less conflict with, the Sixth Circuit's decision in Avon Lake.

Petitioners also attempt to conjure a circuit split by reference to the First Circuit's decision in Haley v. Pataki, 106

F.3d 478 (2nd Cir. 1997) and the Second Circuit's decision in Coalition For Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982). (Petitioners' Brief at 23-25). These decisions did not involve the IDEA at any level, let alone on the obscure issue of the availability of attorneys' fees for the invocation of the stay-put provision. Haley involved an action for declaratory judgment against the State of New York by legislative employees claiming that their constitutional rights were violated by the withholding of their salary payments from an appropriations bill pending passage of the budget. Equally removed from the Seventh Circuit's decision is King, which involved a civil rights action filed by welfare payment recipients after the Massachusetts legislature cut off funding during a budget impasse.

As an implicit concession of the weakness of their position, Petitioners open their discussion of federal court precedent by contending that the Seventh Circuit's decision conflicts with district courts in other circuits (Petitioner's Brief at 17-19). As already set forth, *supra*, this is not a compelling reason for granting a writ of certiorari. *See Sup. Ct. R. 10.* District court cases on the issue of attorneys' fees for invocation of the IDEA's stay-put provision are also so isolated and sporadic that they can hardly be called a consensus.

For example, one of the decisions cited by Petitioners was not even followed by the same court a mere one year later. See J.C. v Mendham Township Bd. of Educ., 29 F.Supp.2d 214, 221-222 (D.N.J. 1998) (refusing to follow Bayonne Bd. of Educ. v. R.S., 954 F.Supp. 933 (D.N.J. 1997) because application of the stay-put provision in that case required the court to interpret the terms of a settlement agreement previously entered into by the parties). Another district court case cited by Petitioners is also unavailing because there, the district court's award of fees was based on the plaintiffs' receipt of an "enforceable

judgment" against the school district that required it to pay the student's private school tuition and costs during the pendency of administrative proceedings. Jarczynski v. St. Mary's County Pub Sch., 30 IDELR 38, 40 (D. Md. 1999). Here, the Seventh Circuit explicitly recognized that Petitioners could have been entitled to attorneys' fees had they obtained an enforceable judgment against the School District. Nathan R., 199 F.3d at 382.

III. Even If The Question Presented By Petitioners Has Created A Conflict Among Courts Of Appeals, Petitioners Have Not Presented An Important Matter For This Court's Review.

Petitioners' request for a writ of certiorari can be disposed of without even considering the absence of a sound legal basis for its issuance because the Seventh Circuit's decision will have little or no impact on the provision of special education services. Petitioners sanctimoniously insist that the Seventh Circuit's decision sounds the death knell for the ability of high school students to utilize the IDEA's stay-put provision. (Petitioner's Brief at 10-13). In this regard, they stake the importance of their appeal on the proposition that school districts will frivolously protract litigation on the stay-put issue, all the while incurring their own attorneys' fees, in the hope that it is mooted by a student's graduation prior to a final judgment on the merits. Petitioners' argument implies not only that school districts are motivated to spend large sums to subvert students' IDEA rights, but that they are so tactically incompetent and fiscally irresponsible to the public they serve that they will needlessly incur their own attorneys' fees just to do so. Viewed from this perspective, Petitioners' argument is exposed for what it is – an unfounded exercise in hysteria.

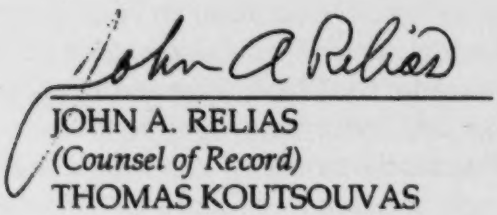
Petitioners not only misstate the utility of the Seventh Circuit's decision as a litigation device for so-called "recalcitrant" school districts, they exaggerate the importance of the holding. The vast majority of IDEA litigation involves disputes over the allocation of financial responsibility for the cost of special education placements or related services. Litigation on these issues, as well as on the issue of compensatory special education services, cannot be mooted by events (like high school graduation) that terminate eligibility for services under the IDEA. The Seventh Circuit's decision is therefore of decidedly limited impact. Indeed, while IDEA litigation has proliferated throughout the federal courts, there is not a single decision by a Court of Appeals on the question presented herein outside the Seventh Circuit. This dearth of analogous precedent underscores the immateriality of the Seventh Circuit's decision for the purpose of an appeal to this Court.

Thus stripped of its hyperbolic luster, Petitioners' request for a writ of certiorari becomes nothing more than the latest effort by plaintiffs' attorneys to gorge at the public trough. Yet the IDEA's fee-shifting provision was not enacted for the special purpose of enriching attorneys specializing in educational matters. Patrick G. v. City of Chicago Sch. Dist. No. 299, No. 94 C 3417, 1994 WL 715590, at *4 (N.D. Ill. Oct. 27, 1994), aff'd, 69 F.3d 540 (7th Cir. 1995). Petitioners have not presented any reason for this Court to abandon that principle.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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